NEW YORK LAW REPORTER

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FOREWORD

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THE

NEW-YORK REPORTER,

FOR AUGUST, 1820.

CONTAINING

REPORTS OF TRIALS

AND

DECISIONS

IN THE DIFFERENT COURTS OF JUDICATURE

BY BARENT GARDENIER, ESQ.
COUNSELLOR AT LAW.

Si quid novisti, rectius istis,
Candidus imperti; si non his utere mecum.

HORAT.

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1820.

THE NEW-YORK REPORTER.

Vol. I. AUGUST, 1820. No. 2.

At a Special CIRCUIT COURT of the United States of America, held for the Southern District of New-York, at the City of New-York, in the second Circuit, on Monday the 17th day of July, 1820:

PRESENT,

The Hon. BROCKHOLST LIVINGSTON, one of the Associate Justices of the Supreme Court of the United States;

The Hon. WILLIAM P. VAN NESS, Judge of the District Court.

The Hon. Judge Livingston delivered a charge to the Grand Jury, and then the court adjourned. The next day the court opened again, and directed the following order to be entered on the minutes:

"It being suggested by the District Attorney, that the present session of this court has not been convened agreeably to law, *inasmuch as the same was not appointed by the Circuit Court, but by the Judge in vacation:* it is therefore ORDERED, that the Grand and Petit Juries be discharged, and that the court be *adjourned*.

We have been favoured with the charge delivered by Judge Livingston to the Grand Jury, and present it to the readers of the *Reporter*, under a persuasion that they will rise from its perusal with no ordinary pleasure and satisfaction.

JUDGE LIVINGSTON'S CHARGE.

Gentlemen of the Grand Jury:

Whatever may be the penal system of any country, it is highly important that the power of accusing, or of putting a party upon trial, should be so disposed of, as not only to ensure vigilance in those to whom it is committed, but to guard against its exercise from malignant, or other improper motives. Against such an abuse, there is little or no security when an individual, as is the case in some countries, may arbitrarily, and without responsibility, charge whom he pleases with the commission of an offence, and thus force him to a public trial. Where this is the case, innocence affords no adequate security against an unjust accusation, and its inseparable companion, suspicion, if not disgrace.

In the United States, this power is vested in a Grand Jury, and it were difficult to devise an institution better calculated to protect innocence, or to bring real offenders to justice. Their numbers—their property—their intelligence—their character and consideration in society—and their knowledge in many instances of the parties, and of the witnesses, independent of the oath which they take, are ample pledges to the public for an able and faithful discharge of the important duties confided to them.

This mode of presenting offences comes to us from Great Britain, and it is not hazarding too much to say, that so long as it shall remain unimpaired, there will be no reason to fear that our criminal code will not be executed with diligence and impartiality, and without any of the inconveniences which too often result from negligence, malice, or favouritism, in the prosecution of delinquents.

As you, gentlemen, have been summoned to serve as Grand Jurors during the present session of the Circuit Court, it will be your duty to inquire of, and to present all offences, so far as they come to your knowledge, which have been committed against the laws of the United States, within the southern district of New-York, or on the high seas, and which are made cognisable by this court.

In performing this duty, you may either originate an accusation on your own suggestion, and of your own motion, or inquire into any matters submitted to your investigation in the form of bills of indictment by the attorney of the United States. In either case, you are at liberty to examine on oath any member of your own body, or any other person, who may be supposed to know any thing material to the inquiry before you: and it can hardly be necessary to observe, that if a grand juror knows of any offence which has been committed against the laws of the Union, it is peculiarly incumbent on him to inform his fellow jurors of it; which is most manifestly implied by that part of the oath which enjoins it on him to "*inquire diligently and to present truly.*" A bare majority, however, so tender is the law even of accusing a person, is not always sufficient to present or find a bill. Whatever be the number of those who are sworn, in no case can a presentment take place unless twelve of the jury agree to it.

Grand Jurors should also be well satisfied of there being good ground for the accusation which they are about to make. In saying this, I do not mean, as some have extravagantly maintained, that they should require the same conclusive testimony to accuse, that might be necessary to justify a petit jury in convicting a party of the offence charged in the indictment. It will immediately occur to every one, that an indictment being only to put a party on his trial, there must be a wide difference between the office of those who are to prefer an accusation, and of those who are to decide finally on the truth of it. While a Grand Jury, therefore, are to discard mere suspicions and remote surmises, they will be justified in finding a bill, if from the evidence before them there

be good reason to believe that the person complained of has committed the crime charged upon him, although they might hesitate on the same testimony to find him guilty of it.

It is also your duty, gentlemen, to receive testimony only on the part of the United States: for the accused has no right to appear before you, either in person or by attorney, or to have any witnesses examined on his behalf. This may at first appear a hardship, but it will no longer be so regarded when we reflect, that before he can become obnoxious to the sentence of the law, the party indicted is entitled to a full hearing—to the aid of counsel—to the attendance and examination on oath of all his witnesses—and in every respect to an impartial trial, by a jury of his peers, fairly and openly conducted, and in presence of a court that can have no motive in deciding the questions of law which may occur in the progress of the trial, other than a sincere desire of doing justice between the public and the party accused

Although the custom of delivering a charge to Grand Juries previous to the commencement of their inquiries, be of great antiquity, and seems to be rendered indispensable by the terms of the oath which is administered to them, I have never thought it necessary to detain them, as is sometimes done, with a detail or enumeration of the various acts which at different times have been designated as offences against the United States; for of statute offences alone, which is a great security to the citizen, have the federal courts cognisance. From such recapitulation, however correct, not much profit nor instruction will be derived, as it will generally excite but little interest at the time, and make but a feeble and transitory impression on those to whom it is addressed. I have thought it sufficient, therefore, when it was probable, as has often been the case in this district, that little or no business would come before them, to state in general terms, as has already been done to you, that it was their duty to present all offences of the cognisance of this court, whether perpetrated on the high seas or in the district in which it is sitting. But when it has come to the knowledge of the court, that any particular crime will become the subject of inquiry, I have thought it proper to explain its nature, and to refer to the law creating it. This duty, I regret to say, is now imposed upon me.

At a former session of this court, we were engaged in the trial of several cases of piracy · a crime which had become so frequent, in consequence of its difficulty of detection, and the continued impunity with which it had been practised, as not only to render commerce insecure in almost every part of the globe, but to expose to imminent danger the lives of those who carry it on. It is to be hoped that the examples which have recently been made among us of this class of offenders, and which yet remain to be made, will not only operate as a warning to those who are concerned in these crusades against the human race, to abandon them before the arm of justice shall overtake them, but also as a check upon those who may have been wickedly contemplating to engage in them. In no other way can we expect to see trade restored to its accustomed freedom and safety, or hope that our feelings will cease to be harassed with the afflicting and disgusting details of robberies, murders, and other enormities, which are daily perpetrating on the ocean, and with which our public prints continually abound.

It is not known that more than one complaint of this kind will at the present term require the animadversion of a Grand Jury: this will be made against a person now in confinement for being concerned with others in piratically and feloniously running away with the privateer *General Rondeau*, which is a crime punishable with death Although this will probably be the only act of piracy which will fall under your cognisance, we lament to say, that your attention will be called to other offences, nearly allied to those which have been mentioned, and in no degree inferior in turpitude, immorality, or cruelty.

Several persons are now confined in the city prison, and others are under recognisance to appear at this court, (which is held principally for their trial) for alleged violations of some of the laws which have been passed for suppressing of the slave trade.

It can scarcely be believed, gentlemen, that in the 19th century of the Christian era, in a land whose population is composed almost exclusively of Christians, and which boasts beyond so many others of the freedom and humanity of its institutions, and whose statute book is burdened with interdictions on this subject, a single individual should be found so daring and so abandoned as to engage in it. But there is too much reason to fear, humiliating as the admission is, that you will be satisfied, before your present labours terminate, that there are men amongst us so destitute of the best affections of their nature, or so entirely absorbed in the pursuit of gain, as not only to disregard the miseries which they inflict on their own species, and to stifle the reproaches of their own consciences, but to set at defiance all the penalties which from time to time have been devised for the punishment of those who embark in this unholy commerce.

By what means slavery was first introduced, and how it came to be tolerated and continued in some of the British colonies which now form a part of the United States, is a research not called for by the present occasion. But it seems hardly just to omit so fair an opportunity, as is now offered, of remarking that it must not be supposed that those of our forefathers, who themselves fled from persecution to enjoy civil and religious liberty in these remote and then savage regions, could so soon forget their own sufferings, or so far commit their reputation for consistency, sincerity, and integrity; or act so directly opposite to all their professions and principles, as immediately and voluntarily to engage in this detestable traffic, and that too under the influence of no other consideration than a lawless attachment to gain. From this imputation, as unfounded as it is rash and ungenerous, considering the quarter from which it comes, a most distinguished, intelligent, and elegant writer of our own country has vindicated them. In this work, which abounds with useful information, and of which every American must be proud, will be found a complete refutation of every calumny which had been so industriously propagated against us in relation to this subject. And it is no small addition to the gratification which we derive from a perusal of this valuable work, to find that all the authorities and arguments are drawn from sources and documents which preclude the possibility of error, or of any satisfactory answer ever being made to them. But to whatever cause may be traced the existence of slavery in the United States, or the origin of a trade, whose extent, criminality and horrors have so long been deplored by every friend of humanity, you are not ignorant, gentlemen, that efforts for several years past have been making throughout almost every part of christendom for its entire abolition.

That all the measures which have been adopted by the different governments of Europe to produce this desirable issue, should be now mentioned, can neither be expected, nor be proper. But when a work so interesting, and which has so long and so assiduously

occupied the talents and time of some of the wisest and best of men is so near its completion, you will not complain of being detained a few moments, while mention is made of some of those who first attracted the attention of the christian world to this subject. And who, gentlemen, can ever refer to the history of this trade, without at once calling to mind the unceasing, ardent, sincere and disinterested endeavours which had so long been making by the society of Friends to obtain its total suppression? This society, which has on every occasion so pre-eminently distinguished itself by the practice of every christian charity, was the first religious community which collectively exerted itself to rescue thousands of the human family from bondage and death. About the middle of the last century, the Quakers in England made a public and official declaration, that this trade was "*inconsistent with religion and common justice.*" Nor did they think, as is sometimes the case, that the whole of their duty was performed by merely making their sentiments public. Their brethren in this country evinced their sincerity not only by manumitting, at very great inconvenience and loss, their own slaves, but by taking care, which has not always been done, that they were not, when liberated, thrown upon the world destitute, helpless, and improvident, so as to become burthens to themselves and others, and proofs rather of the indiscretion and sympathy rather than of the kindness and good sense of the master. Many of this society, both here and in Great Britain, spent also a great part of their time in impressing upon others the injustice and impiety of reducing to a state of absolute vassalage those who had been born as free as themselves, and from whom no injury or offence had ever been received. "Let it be remembered, (says a celebrated writer) if ever slavery be abolished in North America, the Quakers will have had the merit of its abolition." In a cause for the attainment of which every member of a body has contributed his mite, it may seem almost invidious to name a few, who perhaps distinguished themselves more than others only because they were placed in situations in which their labours would be more conspicuous, and more likely to produce a greater effect; and yet, where can any emotion of envy be excited by attributing, as has already been done by others, to *Woolman, Benezet,* and *Warner Mifflin,* a perseverance, an intelligence and a zeal, in this pursuit, without which this great enterprize would, in all probability, never have been brought to a happy conclusion.

Among those whose attention was led to this subject by the proceedings of the Quakers, the name of CLARKSON, a member of the established church of England, will always be recollected with gratitude and respect. Perhaps no one has contributed more towards opening the eyes of mankind upon the cruelties committed on the wretched Africans, than this author has done by his celebrated and invaluable essay on the slavery and commerce of the human species. In this work are canvassed and refuted all the arguments which had been advanced in favour of slavery; and the disgusting manner in which these miserable beings were severed from their friends, their families, and their country—with the dreadful privations and sufferings to which they were exposed on their passage, and after their arrival in the West-Indies, is depicted in colours so vivid, and yet so just, as to have excited every where a correspondent commiseration, except, only with those who could listen merely to the aggravating but insatiable suggestions of avarice.

It is the smallest praise of this eminent scholar and philanthropist, that his work, which was composed in *Latin*, was honoured with the first prize by the University of Cambridge. But even without this mark of distinction, it would ever have remained a monument of the good sense and good feeling of its learned, amiable and benevolent author.

What has been done by the different governments of Europe, and the treaties which have been made between some of them for the extinction of this trade, are matters of history, and so well understood in this country, as to render it unnecessary, were there time for the purpose, to take a particular notice of them—suffice it to say, that so continued, earnest and successful have been the exertions of those powers who became the first advocates of the cause of suffering humanity, (among whom, it is but just to say, that the British government took an early, efficient, and honourable part) that it requires only the assent of Portugal to put an entire stop to this commerce, so far as this desirable result can be produced by those nations, whose subjects have hitherto been permitted to carry it on. Even Spain, who so long manifested a strong reluctance to the measure, has at length yielded to the negociations and importunities of Great Britain, and agreed by a treaty with that nation to put an end to this commerce throughout her extensive dominions—and the means adopted by these two powers, to carry into effect their respective stipulations, and to prevent any violations of them on the part of their subjects, are not only a pledge to each other of their mutual sincerity, but are so judicious in themselves, as to afford every reason to hope that they will be effectual in producing the great object which the contracting parties had in view.

Nor have the United States been inattentive to this subject: If they have not sooner done all that duty seemed to require, and what the friends of abolition may have expected from them, some apology may be drawn from the peculiar circumstances in which they found themselves at the epoch of their independence, and at the time when this great question began to be seriously agitated. It is owing to these circumstances, which will be fully understood without a more particular notice of them, that we find in the Federal Constitution a provision, "That the migration or importation of such persons as the states then existing may think proper to admit, shall not be prohibited by congress prior to the year 1808.

Although under this restriction, congress could not immediately impose on this trade, restraints co-extensive with the mischiefs and calamities resulting from it, yet as far as an interference on their part was permitted, it took place at no distant period from the organization of the Federal Government.

In the year 1794, congress prohibited the carrying on of this trade from the United States to foreign countries. This, however, is not to be regarded as the first expression of the representatives of the American people in relation to this commerce: for it ought never to be forgotten, when this subject is mentioned, that the delegates of the United Colonies, in their very first association, in 1774, for the purpose of obtaining a redress of grievances, inserted an article, "neither to import nor purchase any slave imported, after the first day of December then following;" after which, they further agreed "wholly to discontinue the slave trade, and neither to be concerned in it themselves, nor to hire their vessels, nor sell their commodities or manufactures to those who were concerned in it." It is believed that the signature of every member of Congress from Massachusetts to South Carolina, inclusive, (for Georgia was

not then represented) will be found to that agreement. Although an article of this nature may have been introduced into this association, as one mean of coercion on the parent country, it affords some proof, and that not very equivocal, of what the colonists, if left to themselves, would have been willing and desirous of doing, especially when connected with another measure of that venerable body, which was adopted in less than two years thereafter; I allude to the resolution of the 6th of April, 1776, which explicitly and without any condition, declared, "that no slaves after that time should be imported into the United Colonies."

Since the law of the 22d March, 1794, which has already been referred to, and which prohibited the carrying on of the slave trade abroad, many others have been passed on the same subject, and the various acts which they have declared to be offences against the United States, will now be enumerated.

1st. It is an offence for any person to build, fit, equip, load, or otherwise prepare any vessel within the United States, or to cause any vessel to sail therefrom, for the purpose of carrying on a traffic in slaves to any foreign country, or of procuring from any foreign place the inhabitants thereof, to be transported to any other foreign place to be disposed of as slaves. This offence is followed by a forfeiture of the vessel; and every person knowingly concerned therein, forfeits the sum of two thousand dollars.

2d. Another offence is, for a citizen of the United States to take on board or transport any of the persons above described, for the purpose of selling them as slaves in a foreign country—to this offence is annexed a penalty of two hundred dollars for each person so received on board, transported or sold as aforesaid.

3d. A third offence is, for any person to bring a slave into the Mississippi Territory from any place without the limits of the United States, or to aid or assist therein; a penalty of three hundred dollars is inflicted for every slave thus imported.

4th No citizen or resident of the United States can hold property in any vessel employed in carrying slaves from one country to another, without forfeiting the same, and also double the value of the interest which he had in the slaves which at any time may have been transported in such vessel

5th. A fifth offence consists in citizens or residents of the United States serving on board of any American vessel employed in carrying of slaves from one foreign place to another. This violation of law is punished by a fine not exceeding two thousand dollars and an imprisonment not longer than two years.

6th. If a citizen serves on board of a foreign vessel employed in the slave trade, he incurs the like penalties as if such vessel had been owned or employed by any one residing within the United States.

7th It is also criminal for any person to bring into any state (whose laws prohibit the admission of persons of colour) any person of that description who is not a native, a citizen, or registered seaman of the United States; or seamen, natives of countries beyond the Cape of Good-Hope This crime is punished by a fine of one thousand dollars for each person of colour imported as aforesaid.

8th. If any person of colour, not falling within one of the exceptions just mentioned, be landed from any vessel in any one of the United States just mentioned, such vessel is forfeited.

9th It is also prohibited to bring into the United States, or the territories thereof, from abroad, any person of colour, with intent to hold or dispose of him as a slave; and this under the penalty of a forfeiture of the vessel employed in such importation.

10th. It is likewise an offence for any person to build, fit, equip, load, or otherwise prepare any vessel in any part of the United States, or to cause any such vessel to sail from any such place for the purpose of procuring persons of colour elsewhere, to be transported to any place whatever to be disposed of as slaves. Every such vessel is forfeited, and the persons concerned are liable to a fine not exceeding five nor less than one thousand dollars, and to an imprisonment not exceeding seven nor less than three years.

11th. It is also a crime, and punishable nearly in the same way with the one last mentioned, for any citizen or resident of the United States to take on board or transport, or to be aiding therein, from any foreign place, or from sea, any person of colour, not being an inhabitant, nor held to service by the laws of either of the states or territories of the United States, in any vessel, for the purpose of holding or disposing of him as a slave.

12th. A fine not exceeding ten thousand nor less than one thousand dollars, and an imprisonment not longer than for seven years, are inflicted on those who bring within the United States, in any manner whatever, any person of colour from any foreign place, or from sea, or shall hold or dispose of such person as a slave; and also on every one who is aiding or abetting therein.

13th. Nor can any one hold, purchase, or dispose of any person of colour as a slave who shall be imported into the United States from any foreign place, or from the dominions of any foreign state immediately adjoining the United States. To this offence is attached a fine of one thousand dollars for every person who may be thus disposed of.

14th. By the last act which has been passed on this subject, it is declared to be piracy, and punishable with death, for any citizen of the United States, belonging to the crew of a foreign vessel engaged in the slave-trade, or for any person whatever belonging to the crew of a vessel owned wholly, or in part, or navigated in behalf of any citizen of the United States, forcibly to confine or detain, or to aid or abet in thus confining on board of such vessel any negro or mulatto, not held to service by the laws of either of the states or territories of the United States, with intent to make him a slave, or shall on board of any such vessel, offer or attempt to sell as a slave any such negro or mulatto; or shall on the high seas, or any where on tide water, deliver over to any other vessel any such negro or mulatto with intent to make him a slave, or shall deliver on shore from on board any such vessel, any such person, with intent to sell him, or having previously sold him, as a slave. Let no one regard as sanguinary, a law which has at last made it capital to be concerned in this traffic. The most sceptical on the right of a human legislature to inflict in any case the punishment of death, will be disposed to relinquish any doubt as it respects the offences comprised in this act, if they will only permit themselves to reflect for a moment on the complicated guilt of those who perpetrate them. If in the long catalogue of crimes there be one which more than any other, except treason, justifies and calls for this high expiation, it is the one which has given rise to the present remarks. And certainly, it ought to excite no surprise, that in a code of laws, which had already capitally punished a mere robbery on the ocean, the same penalty should be extended to a crime which is always attended with circumstances of deeper malig-

nity as well as followed by consequences infinitely more extensive and calamitous.

16th. Every vessel found within the jurisdictional limits of the United States, or hovering on the coast thereof, having on board any persons of colour for the purpose of selling them as slaves, or with intent to land them within the United States contrary to law, is liable to forfeiture, and her commander may be fined to the extent of ten thousand dollars, and be imprisoned not less than two, nor more than four years.

These, gentlemen, are the several acts which, by the existing laws of the United States, are made offences, for the purpose of putting a stop to a trade, the deleterious effects of which on the morals and happiness of so large a portion of the human race can never be sufficiently deprecated. But it was soon discovered, that to pass these laws, some of which already require revision, and to leave their execution solely to the judicial tribunals of the country and the ordinary process of law within the United States, would not effectually produce the important objects intended to be accomplished by them. To the commissioned vessels, therefore, of the United States, is given authority to seize every vessel employed in carrying on the slave trade, and to take into custody every person found on board, and to convey him to the United States, to be proceeded against in due course of law. The president is also empowered to cause any of our public armed vessels to cruise on our own coasts, or elsewhere, with instructions to the commanders to seize and bring into port for adjudication all American vessels, wherever found, which may have taken on board, or which were intended for the purpose of taking on board, or of transporting, or may already have transported any person of colour, contrary to the prohibitions of any of these acts.

And to insure on the part of the officers and crews of these vessels, a faithful discharge of these duties, one half of the proceeds of every vessel seized, and of the goods and effects on board, is to be divided between them; provided however that they shall safely keep all persons of colour found on board and deliver them to the marshal of the district, if brought into a port of the United States; or if elsewhere, to such person as shall be appointed by the president to receive them, transmitting also a list of them to the president, that he may give directions for their disposal. And provided also, that the commanders of the vessels making the seizures, shall convey every one of the crew of such vessels to the United States, for trial. As a further motive to vigilance, a bounty of twenty-five dollars is given to them for every person who shall be delivered to the marshal or agent appointed by the president.

Nor has the helpless and unprotected situation of these unfortunate people, when brought among us, been overlooked, or been left unprovided for by congress—for the president has full power to make such regulations as may be expedient, not only for their safe keeping and support while in the United States, but for their removal therefrom. He may also appoint persons residing on the coast of Africa to receive those who may be delivered from on board of vessels seized as aforesaid; and a suitable sum has been appropriated to carry these salutary regulations into effect. Preventive measures have also been thought of. Of this description is the power which is given to the officers of the customs, in certain cases, to require bonds of the owners, masters, or factors of foreign vessels clearing out for any part of Africa, that no native of any foreign country shall be taken on board of such vessels to be transported or sold as slaves in any other foreign place within nine months thereafter. As connected with the measures which have been adopted for the abolition of this trade, and as one which is likely to have no inconsiderable influence on it, is the establishment of the "American Society for colonizing the free people of colour of the United States."

Whatever doubts were at first entertained of the practicability of this plan, the discretion and good sense with which their affairs have hitherto been conducted, and the success which has already crowned their labours, encourage a hope that the great object which the worthy members have in view, of settling, with their own consent, in Africa or elsewhere, the free people of colour who are among us, will, at no distant day, be fully attained, and will be followed by consequences more extensive and more interesting than the most sanguine among them had contemplated. A beginning highly flattering and under the auspices of government, has already been made, and there is nothing to forbid our indulging in the anticipation that this injured portion of the human race, who will always, while in this country, continue in a state of degradation and inferiority, whatever be their pretensions and situation, may yet be restored to the land of their forefathers. Emerging then from this state of inequality and contempt which had so long been their portion among us, why may we not expect to see them in their turn assuming a superiority over their new neighbours, for the sole purpose of consulting their advantage, by introducing among them the arts of civilization, and by spreading in every direction the doctrines of the gospel in all their simplicity and purity. If these happy effects shall flow from the system of colonization, which is now in successful operation, then may the enemies of the slave trade reckon with some certainty on its entire extinction—then may they expect that some amends will be made to the present inhabitants of those extensive regions and to their descendants for the cruel bondage in which so many of their ancestors have languished and died. Then only may they look for a final termination of those animosities and wars, which for ages have been engendered and fomented among the Africans by those who have participated the unrighteous profits, which have flowed from this commerce.

Although all the offences against the laws relating to the slave trade have been brought into view, your attention will be more particularly called to violations of the 2d and 3d sections of the act of the 10th of May, 1800, and of the second section of the one which was passed the 20th of April, 1818.

All the persons in confinement have been sent to this country by the United States sloop of war, the Cyane, under instructions given by the president of the United States, because they were found on board of vessels on the coast of Africa, engaged in the slave trade. If you are satisfied, gentlemen, that such was the employment of the vessels from which these men were taken, when the seizure was made, it will be your duty to present them, whether slaves were on board at the time of seizure or not. If you shall be of opinion that any of the vessels from which they were taken were foreign vessels, then it will be further necessary for it to appear that the party complained of was a citizen of the United States. But if the vessel were American, then not only is a citizen who may have been found on board, but even a resident of the United States, amenable to the law.

The charge which will be made under the act of the 20th of April, 1818, against a merchant of this city, will be well grounded, if you believe from the

testimony, that he has fitted out a vessel in the United States, for the purpose of procuring persons of colour from abroad to be transported to any other place whatsoever, to be disposed of as slaves; or if it shall appear that he has caused such vessel to sail from any place within the United States for the purpose aforesaid, whether he be a citizen or not, is, in this case, unimportant. The act being committed within our jurisdiction and against our laws, the penalty attaches to a foreigner or alien as well as to a citizen or resident, provided he be found within the United States.

Some of the men, whose cases will come before you, were common sailors, and of course only inferior but very necessary agents in these enterprizes—and it may be, that at the time of their engagement, were kept in ignorance of the real destination of these vessels. This has already been alleged by some of them, who may therefore at first appear, and no doubt are, less to blame than the guilty projectors of these abominable voyages, and on this account some commiseration may naturally be indulged for the unfortunate predicament in which they now find themselves. It were indeed to be wished that those who instigate others to the perpetration of a crime, which can be conceived only where there is a total absence of the moral sense, should never escape the denunciations of law. But if the chief actors in these polluted scenes are crafty enough to elude the catastrophe which ought to overtake them, it is no reason why the instruments which they employ and who are taken in an overt act of transgression should also escape. It is absolutely necessary, if this part of our criminal code is not to be abandoned altogether, that seamen before the mast, as well as those from whom their wages are received, should be rendered responsible. No immunity, therefore, from any of these penalties, can be claimed on the ground of ignorance, if these men were found on board of vessels actually employed in this trade. This class of men will thus be stimulated to greater caution, and will talk pains to be better instructed. But if the plea of ignorance were once admitted as an availing excuse, or were to be followed by an exemption from punishment, impositions, not easily detected, would be practised, and the facility of hiring men for this service be greatly increased. Besides, if seamen be exposed to deception in the first instance, there is nothing to extenuate their misconduct if they continue to serve after the real object of their employment be discovered. They are not bound to obey the orders of any master or commander, which are not only contrary to the laws of their country, but which cannot fail to involve themselves in serious difficulties, if not subject them, since the passage of the last law, to an ignominious death.

It might be useful, and at once silence every allegation of ignorance, if all these provisions, which are numerous and scattered through several laws, were brought into one act, and copies furnished by collectors to the masters of American vessels, who should be obliged, under a suitable penalty, to read them to their crews at the commencement of every voyage.

Having already trespassed so long on your time, I will add but one remark more.

In vain, gentlemen, will the nations of Europe enter into treaties with each other for the suppression of this trade within their respective dominions, and adopt salutary and wise regulations for giving effect to their mutual stipulations—in vain will the enemies of slavery form associations for the same laudable purpose—and in vain will the legislature of our own country denounce the most severe and alarming penalties against those who engage in it, unless a portion of the same sentiment, vigilance and energy, be imparted to those to whom are confided the administration and execution of the law.

No doubt is entertained, gentlemen, that you will faithfully perform your share of this duty, to which you are now dismissed, with many apologies for having so long detained you from it.

An opinion delivered in the Mayor's Court of the City of New-York, by PETER A. JAY, Esq. Recorder of the said City, in the cause of *Mary Marschalk* vs. *John M. Mounsey*, in February term, 1820.

At the trial of this cause, the only witness produced was Caleb S. Brower, who testified in substance as follows:

The plaintiff is a widow, whose late husband was a merchant. At his death in 1812, she was desirous to continue her husband's business, and for that purpose formed a partnership with one Thomas Youle, under the firm of Thomas Youle & Co. This partnership was dissolved by the death of Youle, and the plaintiff then carried on business in the name of Caleb S. Brower & Co. But the witness, though his name was thus inserted in the firm, furnished no part of the stock and received no part of the profits. He was a clerk, and acted wholly under the direction of the plaintiff, and received a fixed salary of four hundred dollars a year. Under these circumstances he sold to the defendant the goods for the price for which the present action was brought, and he received payment for a part of them, and gave a receipt signed Caleb S. Brower & Co. He acknowledged that he had signed other receipts in the same manner, and that the sign over the door of the store was the same firm of Caleb S. Brower & Co. On this testimony the defendant moved, and the court granted a nonsuit; because it appeared that the witness was a partner with the plaintiff, and ought to have been joined in the action.

The plaintiff now insists, 1st. That the witness was not a partner, but a mere factor or agent, and that the action is well brought in the name of the principal. And 2dly. That admitting the witness to be a partner, still the action may be sustained by the plaintiff only.

On the first point: It is a well established rule, that as between the firm and all

the rest of the world, every person shall be deemed a partner who either participates in the profits of the business (although secretly) or who suffers himself to be held out to the world as one of the firm.

"If a person suffers his name to be used in a business, and holds himself out as a partner, he is to be so considered, whatever the agreement may be between him and the other partners." (*Watson on Partnership*, 6.) And in *Waugh* vs. *Carver et al.* 2 *H. Black.* 235, Ch. Justice *Eyre* says, "If a man will lend his name as a partner, he becomes as against all the rest of the world a partner."

It is true, that if Brower had *alone* carried on business under the name or firm of Caleb S. Brower & Co. and had sold the goods of the plaintiff, he would have been her factor, and she might have maintained this action in her own name. But the case states, and so the witness proves, that *she* carried on the business under the last mentioned firm. Since, therefore, Brower consented that his name should be inserted in a firm, the stock of which was owned, and the business of which was transacted, by the plaintiff, he must be considered her partner. The counsel for plaintiff, indeed, insist that although this might be right in actions in which the firm were defendants, yet it is not so in any other case; or in other words, that a person who does not participate in the profits of a business, shall not be considered as a partner for any other purpose than to make him liable for the debts of the firm. But I can find no such distinction. As between themselves, the partners must be governed by their own agreements: but as between the firm and others, *they* are to be considered partners whom the law declares such; and that whether they are plaintiffs or defendants. It is, I think, very certain, that if Brower had bought goods, made notes, drawn bills, or entered into contracts, in the name of the firm, the plaintiff and himself would have been jointly bound by his acts: and if this be so, then he was a partner to all intents and purposes, except that by his own agreement he was to receive $400 a year, in lieu of his share of the profits.

Supposing then that Brower was a partner of the plaintiff, the next question to be decided is, whether he ought not to have been joined in this action.

In *Comyn's Digest*, title Abatement, E. 12, we find the following rule: "In every case where two make a contract, and one sues alone without the other, it may be pleaded in abatement;" and as authority for this position, he cites the *Year Book*, 10 *Ed. III.* so that the rule requiring all the parties to a contract to join in an action, founded upon it, is now 700 years old.

When it was first decided that the non-joinder of a plaintiff might be taken advantage of on the *trial*, I have not discovered. But it appears from the case of *Leglise* vs. *Champaute*, 2 *Stra.* 820, that in the year 1729, this was considered and acted upon as a known and well established principle, and it has been acknowledged to be such ever since. Thus we find it laid down in *Chitty on Pleading*, p. 7, "In all cases of contracts, if it appear upon the face of the pleadings that there are other obligees, covenantees, or parties to the contract, who ought to be, but are not, joined in the action, it is fatal on demurrer or on motion in arrest of judgment, or on error. And though the objections may not appear on the face of the pleadings, the defendant may avail himself of it either by plea in abatement, or as ground of nonsuit at the trial, upon the plea of general issue."

And Watson, in his treatise on *Partnership*, page 439, says, "With respect to actions of assumpsit, *all the authorities agree* that if one of several partners bring the action, the defendant may take advantage of it on non-assumpsit, and is not driven to his plea in abatement."

And Sergeant *Williams*, in a note to *Saunders' Reports*, p. 291, although he expresses his disapprobation of the rule, acknowledges its existence.

Having seen then that the general rule is of great antiquity and firmly established, it only remains to inquire whether the present case may not offer an exception.

There *is* an exception to the rule, and the cases cited for the plaintiff will show its nature and extent.

In the case of *Leveck & Pollard* vs. *Shaftoe*, 2 *Esp. R.* 468, in the year 1796, Lord *Kenyon* held, "that if a person had been a partner, and his name in the firm,

and he afterwards withdrew his name, but continued to receive part of the profits, though such person still continued liable as to all demands against the partnership, on the ground of the profit he derived, he would not allow persons who had dealt with the firm without his name appearing in it, to avail themselves of the objection of such partners not having joined in the action for the purpose of a nonsuit, but would suffer the firm with which the defendant had dealt, to maintain the action in their own names only."

So in *Mawman* vs. *Gillett*, 2 *Taunt. R.* 326, in the year 1809, the plaintiff was allowed to sue alone, although it appeared that he had many secret partners.

And in *Lloyd* vs. *Archbowle*, 2 *Taunt. R.* 326, in the year 1810, Ch. Justice *Mansfield* says, "there is a material distinction between the case where partners are defendants and where partners are plaintiffs. If you can find out a dormant partner defendant, you may make him pay, because he has had the benefit of your work. But a person with whom you have no privity of communication in your contract, shall not sue you."

From these cases the following rule is extracted by *Chitty*, 1 vol. 7: "Where a partner" (says he) "has withdrawn his name from the firm, although he may continue to receive part of the profits as a dormant partner, it is not a ground of nonsuit that his name is not joined in the action." It would, perhaps, be more accurate to say, that a *dormant* partner need never be joined as plaintiff, in an action on a contract made with a defendant, who at the time the contract was made was ignorant of his being a partner.

It is plain that neither the rule just explained, nor the cases which have been cited, apply to the cause now before the court.

Brower was *not* a dormant partner; he had *not* withdrawn his name from the firm. He was *not* a person with whom the defendant had no privity of communication. On the contrary, his name *was* inserted in the firm; he was the most prominent person in it, and the only one who made the contract with the defendant.

In the case of *Guidon* vs. *Robson*, 2 *Camp. R.* 302, in 1809, "It appeared that the plaintiff traded under the firm of Guidon & Hughes, and that he had no partner who participated in the profits of his business, but that he had a clerk of the name of Hughes, at a fixed salary, who was held out to the world as his partner, and was generally considered as such:" A nonsuit being moved for, Lord *Ellenborough* said, "There being such a person as Hughes, I am clearly of opinion that he ought to have been joined as a partner. He is to be considered in all respects a partner, as between himself and the rest of the world. Persons in trade had better be very cautious how they add a fictitious name to their firm for the purpose of gaining credit. But when the name of a real person is inserted *with his own consent*, it matters not what agreement there may be between him and those who share the profit and loss: they are equally responsible, and the contract of one is the contract of all. In this case, the declaration states that the defendant promised to pay the money specified in the bill to the plaintiff only, whereas she promised to pay it to the plaintiff jointly with another person: the variance is fatal."

This case and the one now to be decided are so nearly alike, and the decision of Lord *Ellenborough* so clear and decisive, that it would, perhaps, have been sufficient merely to have cited it, and to have forborne all further examination.

I have, however, investigated this subject the more fully, as well because of the confidence expressed by the very learned counsel for the plaintiff, as because another case which remains to be noticed, has been strongly pressed as asserting an opposite doctrine.

That case is the one of *Glossop* vs *Colman & another*, 1 *Starkie*, 25, decided in 1815 by Lord *Ellenborough*. If his lordship has indeed decided that a person whose name is inserted in the firm with his own consent, need not be a party plaintiff in an action brought on a contract made with the firm, it is evident that he has contradicted himself in terms. But before this imputation is made, an examination of the case in *Starkie* will probably show that he is not liable to it.

Glossop sued the defendants for goods sold, and it appeared from the cross ex

amination of his son, who proved the sale, that at the time of the sale the plaintiff held out to the world that the son was in partnership with him, and that the father had frequently given receipts in their joint names; that bills had been made out in the joint names for articles supplied the defendants, and that the very bill for the articles in question, was made out in the same manner. The witness, however, swore that he was not a partner when the goods were supplied, and was then only 17 years of age, and that he had no share in the concern till 1814, when his father gave up the whole business in his favour. On a motion for a nonsuit, Lord *Ellenborough* was of opinion that the conduct of the father in giving receipts, &c. was competent evidence, but thought it would be going *too far* to nonsuit the plaintiff upon it. He *was willing to reserve the point.* His lordship also said, that though an infant was in general repelled from a contract of partnership, as being of too hazardous a nature for an infant to engage himself in, yet undoubtedly upon the most ancient authorities, he might make a contract for his own benefit."

Now, what is it that Lord *Ellenborough* here decides? Clearly this, and nothing more, that the question whether the son was a partner, was, under the particular circumstances of this case, to be decided by the jury, and not by the court. The conduct of the father, he said, in giving receipts in the joint name of himself and son, was competent evidence of partnership to go to the jury; but he thought it would be going too far to *nonsuit* the plaintiff. Even this is said with some hesitation: "He was willing to reserve the point."

But in what did this case differ from the others, that the court should refuse a nonsuit and leave the question of partnership to the jury? This it is not difficult to discover.

It is evident that no person can be made a partner without his consent; and, therefore, in *Guidon & Robson*, Lord *Ellenborough* limits the rule he lays down, to a person whose name is inserted in the *firm with his own consent.* Now in this case, the name of the son was inserted in the firm, but that son was an *infant:* could he then consent? that would depend upon the fact whether it was for his *interest* to consent. "Undoubtedly," (says Lord *Ellenborough*) "upon the most ancient authorities, he might make a contract for his own benefit." It was, therefore, for the jury to decide whether it was, in the case before them, for the benefit of the infant to be considered the partner of his father. And this is the whole amount of that decision.

It is, therefore, clear, that Lord *Ellenborough* was, in both the cases cited, consistent with himself, and that he was right in both.

I have now gone through all the cases which have any bearing upon the point, and the result of the whole is, that the nonsuit was right. The motion to set it aside must therefore be denied, with costs.

Recorder's opinion in the case of *Martha Bradstreet* vs. *Jacob Brooks and Elizabeth his wife.* February term, 1820.

This is an action of slander.

The first count of the declaration complains that the plaintiff resided with her three daughters in a certain dwelling house in the city of New-York, and that the defendant, Elizabeth Brooks, speaking of the plaintiff and her said daughters to several persons, had said, "*You must not visit them, those people are bad characters; that certain persons had told her* (the said Elizabeth) *that they had seen two gentlemen go into the house of the plaintiff, that one of the said gentlemen went out of the house about eleven o'clock at night, and that they did not see the other gentleman come out that evening, and that immediately after the first gentleman came out, the house was still and the lights in the house were seen in the bedrooms;*" meaning that the plaintiff's house was a bawdy house, and that the said gentleman had retired to the said bedrooms with the plaintiff or one of her daughters for the purpose of prostitution. The second count is in substance the same as the first.

The defendant has demurred, and the only question is, whether the declaration is sufficient.

To keep a bawdy house is an indictable offence, and to say of a woman that she keeps a bawdy house, is actionable. This is admitted by the defendant, but he insists that the words laid in the declaration

import no such accusation. And I confess I cannot perceive that, by any fair interpretation, they can be construed to imply it. To state as a fact that two gentlemen had entered a house, and there ate supper, that one of them had then retired, and that the other had lodged there, is to state a fact so perfectly innocent, that it is difficult to imagine by what sophistry evil can be extracted from it. If it were possible from such a fact to guess that the house was other than a private one, it would rather lead to the suspicion that it was a tavern; but no one in his senses would, from that fact only, conclude that it was a bawdy house. It is true the defendant said of the plaintiff and her daughters, that they were people of bad characters, but those words are not actionable, and the proof she gave in support of her opinion, only shows her to be a bad logician. There is no averment or *colloquium* stated in the declaration from which it can be inferred, that more was intended by the words used than they commonly imply. And I am quite clear, that taken alone, they impute to the plaintiff no crime whatever. The plaintiff, however, insists that the words are explained by the *innuendo*, and that on a demurrer the *innuendo* must be taken to be true.

In 4 *Co.* 17, it was resolved, that in every action on the case for slanderous words, two things are requisite: 1st, That the person who is scandalized is certain. 2d, That the scandal is apparent by the words themselves; that the office of an *innuendo* is to contain and design the same person who was named in certain before, and, in fact, stands in lieu of a *prædictus;* but an *innuendo* cannot make a person certain who was uncertain before. And as an *innuendo* cannot make the person certain which was uncertain before, so an *innuendo* cannot alter the matter or sense of the words themselves. And therefore, where the defendant in the case then at bar, said of the plaintiff that he was full of the pox, *innuendo* the French pox; this *innuendo* doth not do its proper office, for it endeavours to extend the general words by imagination of an intent, which is not apparent by any preceding words to which the *innuendo* should refer.

And in *Barham* vs. *Nethusal*, 4 *Co.* 20, the words were, "Martin Barham did burn my barn:" (*innuendo*, a barn with corn:) and after verdict, it was moved in arrest of judgment, that the words were not actionable, for it is not felony to burn a barn if it is not parcel of a mansion-house, or full of corn. And the *innuendo* will not serve when the words themselves are not slanderous; which, says *Coke*, well agrees with divers of the resolutions before.

The doctrine of these cases has been held to be sound law ever since, and is recognised by the Supreme Court in *Pelton* vs. *Ward*, 3 *Caines*, 76. All these cases were after verdict, and the demurrer cannot confess more than a verdict would prove. But the same doctrine was held in *Brooken* vs. *Coffin*, in 5 *Johnson*, 189, which was upon demurrer. If then in the present case, the *innuendo*, to use the language of Lord *Coke*, extend the general words by imagination of an intent, which is not apparent by any preceding words to which they should refer, then they do not do their proper office, and cannot support the declaration.

It sometimes happens that words are used by which more is meant than meets the ear, and which, though taken unconnected with any thing else they would be innocent, yet under the circumstances in which they are spoken, convey an accusation. In that case, the circumstances influencing their meaning must be made apparent, not by *innuendoes*, but by averments.

This declaration, however, contains no special averments, nor any thing from which a criminal imputation can be implied.

There must be judgment for the defendants.

The Recorder's opinion in the case of *Robert Linnen* vs. *Ruth Hughes*. March term, 1820.

This is an action of trespass on the case for obstructing a right of way.

The defendant pleaded not guilty, and at the trial a verdict was found for the plaintiff.

The defendant moves in arrest of judgment and for a new trial.

The first motion is founded on a supposed defect in the declaration, which it is therefore necessary to examine.

It contains three counts.

The first count states that the plaintiff was *lawfully possessed of* a certain messuage and close, with the appurtenances, in the 10th Ward of the city of New-York, and by reason thereof, ought to have a certain way adjoining the said messuage and close, from a street called Second-street, into, over, and through a certain lane to the said messuage, and back again, for himself and his servants, &c. Yet the defendant caused to be erected across the said alley a certain fence, and prevented the plaintiff from using the said way, &c.

The second count is in substance the same as the first.

The third count states that the plaintiff was *seized* of two dwelling houses with the appurtenances, and by reason thereof, ought to have a way over the alley, and that the defendant, intending to injure him in his *hereditary estate*, obstructed the way.

The objection to this declaration is, that the plaintiff counts only upon his possession, and ought to have set forth his title.

This is a question which has heretofore undergone very great discussion, but which is now fully settled.

In an action for trespass on land, the plaintiff never shows in his declaration any other title to the land than possession. And even in ejectment, the declaration is silent as to the title of the lessor, and the reason is, that if the defendant claims no title himself, it is totally immaterial by what right the plaintiff is in possession. And if the defendant does claim title in himself, he may plead it, and then the plaintiff must either disprove it or show a better.

I do not perceive why the same rules should not be observed in actions for injuries done to incorporeal hereditaments, as in those relating to corporeal hereditaments. And such is now the settled law.

Where the plaintiff seeks to impose a burthen on the land of another, as to compel him to build a party wall, to repair a road, or to fence, &c. then the declaration must state the right under which he claims; but where he merely complains of the defendant as a wrong-doer, he need only show himself in possession of the franchise or privilege, the exercise of which has been obstructed.

Such was the decision in the case of *Strode* vs. *Byrt*, 4 *Mod.* 418, upon writ of error, in which the declaration was very similar to the one in this cause. As that case was most elaborately argued, and as all the authorities are there collected and considered, I shall merely refer to it, without repeating the arguments which were used.

The same point was adjudged in *Rider* vs. *Smith*, in 1790, 3 *D. & E.* 766. It was again stated as the law by Lord *Kenyon*, in *Grimstead* vs. *Marlow*, in 1792, 4 *D. & E.* 718.

The case of *Fentiman* vs. *Smith*, 4 *E. R.* 107, was cited as supporting an opposite doctrine. But it is exactly the reverse. The declaration in that cause, as in this, was on the *possession* of the plaintiff, and was not denied to be sufficient; but a new trial was granted, because the plaintiff had not proved that the use of the water for diverting which the suit was brought, was appurtenant to the mill which he possessed. I am, therefore, of opinion, that the declaration is sufficient.

At the trial it was admitted that one John Little was formerly seized in fee, and possessed of all the land now occupied or claimed by the plaintiff and by the defendant, and of the land over which the plaintiff claims a right of way. The plaintiff gave in evidence a deed from Little to Azel Simonson, dated the 15th June, 1810, by which Little conveyed to Simonson in fee, "All that certain piece or parcel of ground situate in the tenth ward of the city of New-York, bounded westerly in front by Second-street, easterly in the rear by ground now or late belonging to Cornelius Ray, *northerly by an alley or cartway eight feet in width*, and southerly by ground now or late belonging to the said Cornelius Ray, containing in breadth in front and rear, each twenty two feet, and in length on *each side* seventy-five feet, *together with the use and privilege of the said alley.*"

The plaintiff also gave in evidence another deed from Simonson to himself, for the same premises by the same description.

Two witnesses, the father and brother of Little, then proved, that about the time of the sale to Simonson, they were present when he laid out ground then vacant into lots, and saw him lay out the alley as described in the deed, the whole length of the lot sold to Simonson. One of the witnesses, on his cross-examination, testified that Little, two years after, put up a fence in the place where that complained of now stands.

Another witness for the plaintiff testified, that shortly before the bringing of this suit, the defendant obstructed him in passing through the alley, and resisted his passage with great violence; that he took down the fence which was built across it, and that the defendant thereupon erected another.

The defendant then moved for a nonsuit, which was refused, and he now moves for a new trial, on the ground that the evidence did not support the declaration.

It was admitted that John Little owned the ground over which the way is claimed. He had then authority to grant a right of way over it. By his deed to Simonson, the grantor of the plaintiff, he did grant a right of way over a part of his land, described as a certain alley or cartway, eight feet wide, and adjoining the plaintiff's lot; then the only question which can remain, and which in fact is the only dispute between the parties to this suit, is as to the length of the alley: this depends upon the conveyance, and that does not expressly mention its length, but affords data from which it can be ascertained, and *id certum est quod certum reddi potest.* It describes the lot conveyed to Simonson as 75 feet long on each side, and as being bounded on one side by the alley. Now if the alley be not as long as the lot, then the lot cannot be wholly bounded by it on one side. It must, therefore, be at least as long as the lot.

It was also contended, that a fence having been built across the alley by Little, seven or eight years ago, the defendant ought not to be convicted of erecting, but ought to be sued for continuing the obstruction. The testimony, however, was positive, that the present fence was erected by her, so that there is nothing in this objection.

After the motion for a nonsuit was overruled, the defendant offered in evidence a deed from Little to one Stiles, dated 7th February, 1812, for land, including the part of the alley now obstructed by the defendant, and another deed for the same premises from Stiles to her.

These deeds were rejected by the court, because, if Little granted the right of way to Simonson in 1810, he could not revoke that grant by a deed made in 1812.

For the same reason the court refused to allow evidence of the acts and declarations of Little, to show that the alley was not 75 feet long.

The defendant also offered to prove by the declarations of Simonson, the grantor of the plaintiff, that the alley never extended further than to a certain point, and did not pass over the spot where the obstruction was placed. This evidence was also overruled.

This is the only point in the cause in which I have doubted. But upon the whole, I think the decision was right.

In the first place, Simonson being still alive, his declarations ought not to be received, since he might himself be called as a witness.

But there is a still stronger objection.

In the case of *Jackson* vs. *Shearman*, 6 *Johns. R.* 21, the court say, "the next point in the cause is, as to the acknowledgments of Henry Shearman. These acknowledgments of the party as to title to real property, are generally a dangerous species of evidence; and though good to support a tenancy, or to satisfy doubts in cases of possession, they ought not to be received as evidence of title. This would be to counteract the beneficial purposes of the statute of frauds."

In *Stuyvesant* vs. *Tompkins & Dunham*, 9 *Johns. R.* 63, which was on writ of error from this court, the parol declarations of the defendants were allowed to be given in evidence in an action of trespass on a question of boundary, and the Recorder charged the jury that they might infer from them, that the defendant held only by permission of the plaintiff, and that therefore his possession was not adverse. The Supreme Court in their opinion say, "This doctrine cannot be supported. The parol admission of the defendant was certainly not sufficient, *per se*, to change the posses-

sion. To give to a naked parol declaration such an effect, after so long an acquiescence in a boundary line, would counteract the beneficial effects of the statute of frauds, and render the title to real property alarmingly insecure. The judgment must be reversed." And this decision of the Supreme Court was afterwards affirmed by the Court of Errors.

The declarations of parties are often evidence to show under whom the tenant held, and also to prove a boundary where the deeds leave it uncertain, as in relation to the identity of the trees or other landmarks. But they can never be received to contradict a deed, or to limit its operation. If Little granted a right of way along the whole length of the plaintiff's lot, then a parol declaration of the plaintiff that it extended only half way the lot would not bind him, nor divest his right in the other half.

I am of opinion, therefore, that the verdict ought not to be disturbed.

Judgment for plaintiff

The Recorder's opinion in the case of the *Mayor, Aldermen and Commonalty of the City of New-York* vs. *Adam Logan*. June term, 1820.

This is an action of debt brought by the Corporation of New-York upon a by-law of that city, commenced before the assistant justice of the 6th ward, against the defendant, for exercising the trade of a pawnbroker without a license. The defendant pleaded *nil debet*, and a verdict was found and a judgment rendered against him from which judgment he has appealed to this court. The proceedings were returned and filed here in June last, since which no step has been taken by either party.

The respondents now move to dismiss the appeal.

1st. Because the appellants have not used due diligence in prosecuting their appeal. and

2d. Because this court has no jurisdiction of the cause.

The motion has been submitted without argument, and I regret that I am compelled to decide a case of novelty and importance without any assistance from the talents or the researches of counsel.

The motion ought not to be granted for the first reason assigned, because the rules of this court authorize either party to bring the cause to a hearing, so that the delay which has intervened is to be ascribed as much to the laches of the respondents as to those of the appellant.

In appeals as in replevin there can be no judgment as in case of nonsuit for not going to trial.

Upon the second point, having come to a conclusion opposite to my first impressions, I shall state somewhat at large, the authorities and the reasons which have produced that conclusion.

Lord *Coke* says, (*Co. Litt.* 157) "If a body politic or corporate, sole or aggregate of many, bring an action that concerns their body politic or incorporate, if a juror be of kindred to any that is of that body, (although the body politic or incorporate can have no kindred) yet for that those bodies consist of natural persons, it is a principal challenge."

The following cases from the *Year Books* are cited as authorities for this proposition, and may serve to show its extent.

In assize, the tenant pleaded that he held of the mayor and commonalty of D., and that the reversion was in them and not in the plaintiff; whereon issue was taken, and the array was challenged and quashed, because it was composed of people of the commonalty. (18 *E.* 3. 18 *Ass.* 18.

In *Home's Reports*, against an abbess, (7 *E.* 4. 4) a juror was challenged because he was cousin to a nun of the monastery: this was considered at first as challenge to the favour, and the triors found the juror indifferent, notwithstanding which, he was set aside, the judges holding it to be a principal challenge.

In assize, against dean and chapter of Lincoln, (17 *E.* 4. 7) a juror was challenged because he was brother to one of the canons: this was held not to be a principal challenge, and the juror was sworn, for which the judgment was afterwards reversed in the Exchequer Chamber, it being decided that the challenge ought to have been allowed. (21 *E.* 4. 63.)

It was held by the Justices of the Common Bench, (28 *H.* 6. 10) that it was a

good challenge to the poll, where an abbot or a prior brought an action that a juror is uncle or brother to a monk of the same place, and a principal challenge.

It is to be observed, that in all these cases the corporation were the parties on one side of the suit, and strangers to the corporation on the other.

1661. (*Lev.* 14.) *Mayor & Commonalty of London* vs. *Bernardiston*. On habeas corpus, it was returned that by custom, the corporation made by-laws, and the suit was on a by-law imposing a penalty on forcigners who sold goods usually sold by weight, without having them first weighed at the city beam, to be recovered by the chamberlain in the Sheriff's Court, and not elsewhere. The by-law was held good and a *procedendo* awarded.

This case shows that it was usual to maintain such suits in the city courts, and the question of jurisdiction was not even raised by the counsel. But I apprehend the authority of the case is shaken by the subsequent decision of *Hesketh* vs. *Braddock*.

1699. (*Lord Raymond*, 496. 3 C. *Carth*. 480.) *City of London* vs. *Vanecker*. This was an action on a by-law, for a penalty of £500, for refusing to accept the office of sheriff. The by-law was held good, and a *procedendo* awarded. But here too the question of jurisdiction was not raised.

1701. (1 *Salk*. 397, 12 *Mod*. 669) *Wood* vs. *Mayor & Commonalty of London*. This action was similar to the last, and there being judgment against the defendant, he brought a writ of error; and one of the errors assigned was, that the Mayor's Court of London had no jurisdiction of the cause, and for this reason the judgment was reversed.

1776. (3 *Burrows*, 1847.) *Hesketh* vs. *Braddock*. This was an action brought by the treasurers of the city of Chester in the Portmote Court of that city. The declaration stated a custom to exclude all persons who were not free of the city, from selling by retail, a by-law founded on that custom, and a breach of the by-law by the defendant. The plea was *nil debet*. At the trial, the defendant challenged the array, because the sheriff was a freeman, which being disallowed, he challenged the polls, because all the jurors were freemen; this challenge was also disallowed, and the plaintiffs had a verdict and judgment. On a writ of error to the Court of Great Sessions, the judgment was reversed, and that judgment of reversal was affirmed in the King's Bench. Lord *Mansfield*, in giving the latter judgment, says, "In the regulation of their own members, they may, indeed, make by-laws and enforce the observance of them, by prosecutions amongst themselves, because every member of the corporation is bound by the jurisdiction into which he voluntarily enters, and being all of them freemen, their circumstances are equal. But if corporations were to try their *own* suits against *strangers*, upon a by-law for excluding all *traders but themselves*, there would be an end of the distinction which has long been established, that a by-law which lays this restraint upon trade is void, unless there be a custom to support it.

This case is conclusive to show, that where a corporation claim a right adversely to a stranger, there they shall not be jurors, nor (I presume) judges in their own cause.

But where the only question to be decided is whether one of the members of a corporation has broken a by-law, there is no reason why that question should not be tried in a court of the corporation. This distinction is clearly stated by Lord *Mansfield*. In the regulation of their own members (says he) they may make by-laws and enforce the observance of them by prosecutions amongst themselves; because every member of the corporation is bound by the jurisdiction into which he voluntarily enters, and being all of them freemen, their circumstances are equal."

We have, however, seen, that in *Wood* vs. *The City of London*, which was not against a stranger, but a freeman, for the penalty of a by-law, the judgment was reversed for want of jurisdiction in the Lord Mayor's Court.

It therefore becomes necessary to examine the reasons of that judgment. They are shortly stated in *Salkeld*, and more at large in 12 *Mod*.

It was resolved that the penalty might be sued for in the Court of the Mayor and

Aldermen, if the mayor could be severed and the court held before the aldermen only.

That if the mayor was an integral part, so that there could not be a court without him but it must be the Court of the Mayor and Aldermen, it could not be sued for there; for then the same person was judge and plaintiff, agent and patient, which could not be.

That though the mayor absents himself and the recorder sits for him, and that by the custom of the city, yet it alters not the case; for though the recorder sits personally, and it is personally his judgment, yet it is legally and virtually the act of the mayor: the recorder is his deputy, and his act is the act of his superior. The style of the court is before the mayor and aldermen, and a man cannot sue either before himself or his deputy.

It was admitted that the action might have been maintained in the Sheriff's Court.

It was admitted that the action might have been maintained before the Mayor's Court, if the mayor had not been of necessity a judge of that court, and if it had not appeared upon the record that he was both judge and party. The objection, says *Ch. Baron Ward*, does not arise from point of *interest*, but from point of *inconsistency*; for an objection from the point of interest would be of no force; for the mayor has no greater share of the penalty to be recovered than even the defendant has. *Objection*—Though the style of the court be before the mayor and aldermen, yet they are never there, but all is done before the recorder. *Answer*—This were to take an averment against the record, whereby it appears that the court was held before the mayor and aldermen.

From these cases it results, first, that this court cannot take cognisance of causes in which the corporation of this city claim any right against a st anger, because all the judges of this court, and all the jurors who can be summoned by it, must be members of the corporation, and interested in the event of the action.

Second, that objection of *interest* cannot be made in the case of a suit between members of that corporation, or of a suit for the penalty of a by law against a member.

Third, that if there be any valid objection to the jurisdiction of this court, it must arise from the apparent inconsistency of the same person appearing upon the record to be both judge and party, and this is the only question which remains to be discussed.

In the case of *Wood* vs. *The City of London*. it was held that the action might have been maintained if the mayor could have been severed from the rest of the judges. But as by the constitution of the Lord Mayor's Court, the mayor was a necessary member of the court, which could not be held without him or his deputy, and as the record stated the court to be held before him, against which record there could be no averment, therefore a suit in which he as mayor was a party, could not be tried before himself.

Now in this court the mayor may be severed from the rest of the judges. His presence is not necessary. The court may be, and is held by the recorder, in his own right, and not as the mayor's deputy. The *placitum* of the record does not state that the court is held before the mayor: no inconsistency appears upon the record, and therefore there is no greater objection to the maintaining of this action than there would be to a suit brought in the Supreme Court by one of its judges.

I am therefore of opinion that the court has jurisdiction of the appeal in the present instance, and consequently the rule asked for is refused.

The Recorder's opinion in the case of *James Hooven* vs. *The Barque Gideon*, Joseph Jones, owner. July term, 1820.

The referees to whom this cause was referred, have reported that there is due to the plaintiff the sum of $178 11, and that the same is a lien upon the said vessel, her tackle, apparel and furniture.

Wm. C. Holly now claims to be the owner of the said vessel, and moves to set aside the report upon affidavits stating the following facts:

Joseph Jones being the owner of the vessel, employed the plaintiff to repair

her, and on the 29th of January, 1819, made a settlement with him, upon which it appeared that there was due to the plaintiff for those repairs $163 13. They at the same time settled for the repairs done to the schooner Combine, and Jones gave the plaintiff a check on the Phœnix Bank, payable 2d February, 1819, for $433 45, and the plaintiff signed the following receipt:

Received, New-York January 29, 1819, of Mr. Joseph Jones, four hundred and thirty-three dollars forty-five cents, for barque Gideon and schooner Combine, which is in full for bills rendered.

JAMES HOOVEN.

The check was duly presented but not paid for want of funds.

Joseph Jones executed a bill of sale for the Gideon to W. C. Holly, as collateral security for moneys due from Jones to Holly, which bill of sale was afterwards destroyed by the parties; Jones retaining possession of the Gideon during the existence of that bill of sale.

On the 3d February, 1819, the attachment in the present suit was issued, and the vessel was attached by the sheriff on the same day.

Previous to the attachment Jones had shown the plaintiff's receipt to Holly, and assured him that the Gideon was free from incumbrances.

On the 4th February, 1819, Jones regularly and for a valuable consideration conveyed the Gideon to Holly.

It is contended on the part of Mr. Holly that the plaintiff released his lien on the vessel by accepting the check in payment, and by giving a receipt in full; and that Holly having purchased under a supposition that the vessel was free from incumbrances, which supposition was occasioned by the receipt, the lien cannot attach upon her in his hands. It does not appear at what time the bill of sale, which was intended as a collateral security, was executed. But it is clear that it was a mere mortgage, that it has since been cancelled, and that no one at present claims any title under it. It may therefore be laid out of the case.

The sale to Holly, made *pendente lite*, can have no influence on the judgment to be rendered. An owner cannot, by selling a vessel against which an attachment has been issued, defeat the rights of the plaintiff: all that Holly could acquire by the purchase, is a right to stand in the place of Jones. The circumstance that Holly saw the receipt given by the plaintiff, is of no moment, since he did not make the purchase till after the service of the attachment, which was notice to all the world of the plaintiff's claim. The cause must therefore be decided as if Jones were still the owner. As against him, it is clear that the receipt is not conclusive evidence. And the facts show that it was void, the consideration being a check upon a bank in which the drawer had no funds. There then remains only one question to be disposed of—Whether the plaintiff released his lien by accepting the check. And this question has already been decided by this court in the case of *Jonathan Charlton and others* vs. *The ship Douglass*, 1 *N. Y. Reporter*, 25, where it was held that acceptance of a promissory note of the owner had not that effect.

There must therefore be judgment for the plaintiff.

The Recorder's opinion in the case of *Robert Tier* vs. *Peter G. Stuyvesant*. March term, 1820.

This is an action of trespass.

The declaration contains two counts, to which the defendant has pleaded separately.

The first count is for taking and distraining the horse of the plaintiff.

To this the defendant pleads that he was lawfully possessed of a certain close; that the horse was doing damage thereon; that he took and impounded him, and that he was afterwards sold according to law, and the plea contains the necessary averments, to show that the distress and subsequent proceedings were regular and legal.

The plaintiff replies, that the horse, at the time when, &c. was in the use and lawful possession of the plaintiff and his servants, and traverses that the horse *so being in the use and possession of the plaintiff and his servants*, was wrongfully in the close of the defendant doing damage there.

The defendant demurs to the replication, and the plaintiff joins in demurrer.

The traverse in this replication is a

negative pregnant, and does not deny any one part of the plea. It is, therefore, clearly bad. But the defendant has demurred generally, and a bad or idle traverse can only be taken advantage of on a special demurrer. 1 *Chitty on Pleading*, 598. 1 *R. L.* 121.

It remains, therefore, to inquire whether the residue of the replication is sufficient.

Lord *Coke* says, (*Co. Lit.* 47) "Although it (a distress) be of a valuable thing, as a horse, &c. yet when a man or a woman is riding on him, or an axe in a man's hand cutting of wood, and the like, they are for that time privileged, and cannot be distrained."

So *Comyns* says, (3 *Com. Dig.* 13) that "a horse on which a man rides on the corn of another, cannot be taken *damage feasant*, nor a net which a man carries in his hand upon my land."

But in *Tunbridge's case*, (*Cro. Eliz.* 7, in 1582) it was adjudged that horses yoked to a plough might be severed from the plough, and distrained *damage feasant*. It does not, however, appear from the report, whether a man was holding the plough at the time of the distress.

In *Read* vs. *Burley*, (*Cro. Eliz.* 549, in 1597) it was held that yarn on a man's shoulders could not be distrained for rent.

In *Welch* vs. *Bell*, (1 *Keeble*, 596, in 1670) *Keeling and Moreton* judges, held that a horse whereon a man is riding, may be distrained *damage feasant*. But the cause was decided on another point. This case is also reported in 1 *Vent.* 36. 1 *Sid.* 422. and *Cro. Eliz.* 7.

In *Simson* vs. *Harcourt*, (*Wille's R.* 517, in 1732) which is cited with commendation by Judge *Buller*, in 4 *T. R.* 569, the chief justice says, "this stocking frame was not distrainable, (for rent) it being in actual use, because it could not be restored in the same plight, for the stocking then weaving must necessarily be damnified: another reason is, because when it is in custody of any person in actual use, it cannot be taken away without a breach of the peace."

In *Storey* vs. *Robinson*, (6 *T. R.* 138, in 1795,) it was adjudged that a horse could not be distrained *damage feasant*, while a man was riding him.

The result of those authorities appears to be, that to preserve the peace, a chattel is privileged from distress as long as it is so in the occupation of a possessor, as that it cannot be distrained without doing to him personal violence, as by snatching an axe or a net out of his hands, or leading him away with the horse upon which he is riding. But it does not follow that every chattel is privileged which, in the words of the replication, is in *the use and lawful possession of the owner*.

In *Bisset* vs. *Caldwell*, (1 *Esp. R.* 207, in *notes*, in 1791,) Lord *Kenyon* held that the wearing apparel of a man and his wife might be distrained while they were in bed, though it was that which they intended to put on in the morning, and were in the daily habit of wearing. Yet this apparel might justly be said to be in the use and lawful possession of its owners.

So a kettle, when hanging over the fire, a dyer's vat containing cloth, a portable still when in operation, and a thousand other implements, may be in the lawful possession and actual use of their owner, without being on that account privileged from distress.

A greyhound which chases rabbits in a warren, may be distrained; (1 *Roll.* 664) and it does not appear that the presence of the owner would protect it.

Suppose a man should drive before him a loaded horse through another man's meadow, the horse would be in the use and lawful possession of his master. Yet I can perceive no reason why he might not be distrained. The plea, therefore, is inaccurate. It ought to show how the horse was used at the time of the distress, in order that the court might judge whether, under the circumstances of the case it was protected; or at least it should show that the use made of the horse was of such a nature that he could not be distrained without bodily violence to the person using him. On this account, I think the replication a bad one, and judgment must, on this demurrer, be rendered for the defendant.

The second count of the declaration is, for taking the plaintiff's horse and converting it to the use of the defendant. To which the defendant pleads that he was possessed of a certain close, that the horse was upon that close incumbering the same,

and doing damage; and that the defendant took the horse and removed him out of the close, and there left him for the use of the plaintiff.

To this the plaintiff replies, that true it is, the defendant was possessed of the said close, but that the defendant, of his own wrong, took the horse without that; that the said horse was wrongfully on the said close, incumbering the same and doing damage there.

The defendant has also demurred to this replication, and has assigned for cause, that it puts in issue each of the several facts mentioned in the plea. But this is a mistake. The plaintiff singles out the most material fact in the plea, viz.: that the horse was doing damage on the defendant's close, and he formally traverses this fact; and the defendant might, if he had pleased, have taken issue upon it.

It is true the more modern and the better method of replying is, simply to deny a material fact, and conclude to the country. But the mode which the plaintiff has pursued, is the more ancient, and is precisely that sanctioned in 1 *Chitty on Pleading*, 595. On this demurrer there must, therefore, be judgment for the plaintiff.

The parties have leave to amend on payment of costs.

At a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York for the month of JULY, 1820:

PRESENT,

The Honourable

CADWALLADER D. COLDEN, *Mayor.*

ASA MANN, GEORGE B. THORP, } *Aldermen.*

PIERRE C. VAN WYCK, *Dist. Attorney.*

JOHN W. WYMAN, *Clerk.*

GRAND JURORS.

Philip Hone, Foreman.

James Bailey,	Henry Kermit,
Abraham Brinckerhoof,	Dominick Lynch, jun.
John L. Bowne,	Abraham Lefoy, (excused)
William Coulthard,	William P. Rathbone,
Peter Crary, jun.	Philip Lockwood,
Isaac S. Douglass,	Thomas C. Pearsall,
Edmund Smith,	Benjamin Romaine,
Henry Eckford,	John Scoles, (excused)
William Edgar, jun.	Jotham Smith,
Moses Field,	Robert Troup, jun.
John Greenfield,	Henry Ward,

William B. Crosby.

The People vs. Samuel M'Dowell and James Farrel, al. dict. James Carrol.

Indictment for stealing a trunk containing various articles of jewellery, &c. the property of James Black, valued at $1200. Mr. Black, it appeared, resided at Philadelphia, and came on to New-York on the 12th of May last, with the trunk, which contained, besides the jewellery, some shirts and other apparel. He arrived about dusk at the City Hotel, and the trunk was taken into No. 13, in the third story, where he saw it deposited, and in about an hour after he discovered that it was gone. A man by the name of William Kelly had been that day about the hotel, assisting the waiters in getting up a great dinner by the friends of Gov. Clinton. He was suspected, and apprehended; but no evidence appearing against him, he would have been discharged if the police magistrates had not detained him as a vagrant. In this way *Kelly* was committed. But the magistrates some time after sent an order to the keeper to bring him before them, which the keeper understood to be an order for his discharge, and discharged him accordingly. He was, however, taken up again some days afterwards, and re-committed. He remained in confinement for some time without making any disclosure. At last, however, he informed one of the police magistrates that he wished to see Mr. Black, for he thought he could put him in the way of getting his property again. A letter was sent to Black, who came on, and visited Kelly in the prison; and the latter in the course of a day or two disclosed the circumstances of the theft to Black and Gen. Christian, one of the police magistrates; in consequence of which a police officer was sent with Black to the house of Farrel, where search being made, none of the jewellery could be found, nor any other property of Black's, except a shirt, which they found in a trunk. This shirt Black testified was in his trunk when the trunk was stolen, and he swore positively to its being his. The marks containing his initials had been cut out.

William Kelly being then sworn, testified, that he had for some time boarded with Farrel, and been concerned in thieving with him; that the prisoner, M'Dowell, who also boarded there, informed him that a great dinner was to be given at the City Hotel, and that he, M'Dowell, was to be a waiter there. And it was then agreed between M'Dowell, Farrel, and himself, that they should steal whatever they could.—Kelly put on M'Dowell's surtout coat, his own being very shabby, and they went to the hotel. There Kelly assisted the waiters, and stole two bundles, which M'Dowell and he took to Farrel's house. That about dusk Mr. Black arrived, and he saw the trunk placed in No. 13. At this time M'Dowell and Farrel were at home, whither Kelly went, and told them of the trunk. Then all three went back to the hotel, and Kel-

ly went up stairs, brought the trunk down, and in the passage, near the front door, delivered it to Farrel. Farrel afterwards told him that there were watches and jewellery in the trunk, and some papers, which latter he had burnt.

It appeared from all the testimony that this confession had not been extorted by promises or threats, but was made voluntarily. Kelly professed much contrition for his misconduct, imputing the whole to Farrel, and declared that he had made the disclosure simply because he suffered deeply in his feelings for Mr. Black's great loss.

The examination of M'Dowell before the police magistrates, after he had been arrested in consequence of Kelly's disclosure, was then read, and fully agreed in all particulars with Kelly's account.

Farrel, in his examination, denied all knowledge of the transaction, but admitted that he was at the hotel the evening the trunk was stolen.

The evidence was summed up for the prisoners by Mr. *D. Graham* and Mr. *Rodman*, who contended that M'Dowell and Farrel, as they had not, in the first instance, taken the trunk, but after the felony by Kelly was complete, had merely received it from him, were *accessaries* only, and not *principals*. They insisted also that there was nothing to criminate Farrel but the mere testimony of Kelly, and that he was an accomplice, and ought not to be believed, unless he was corroborated strongly by other testimony.

Mr. *Van Wyck*, District Attorney, declared, that it was the right of the honest part of society to protect themselves, by using the testimony of accomplices against each other, if any were willing to confess. He admitted the law to be, that it was dangerous to convict solely on such testimony. But if such a witness was borne out by circumstances, and his testimony corroborated by others, and especially if his original confession was fair and voluntary, the jury had a right, and were bound, to believe him. Mr. V. W. here recapitulated the testimony, and showed that Kelly's story agreed with the confession of M'Dowell, and the testimony of Gen. Christian and Mr. Black, in every particular. As to the idea that M'Dowell and Farrel were mere *accessaries*, he said that the law was clear and settled, that if several went together to commit a theft, some in the house, and some out, so as to assist each other if there should be need, they were all principals.

Mr. Recorder Jay fully agreed with the District Attorney in his exposition of the law, and after elucidating the reasons somewhat more at large, and very satisfactorily, concluded by informing the jury, that if they believed Kelly, it was their duty to convict the prisoners. The jury retired for about half an hour, and returned with a verdict of *guilty*. *Mr. Van Wyck for the people, Mr. D. Graham, Mr. Rodman, and Mr. R. Riker, for the prisoners.*

The People vs. Charles Stewart.

Indictment for assault and battery on Jackson, a coloured man, committed on board the sloop Ocean, of Albany, whereof defendant was master, and complainant a hand on board.—Jackson testified that he cut his finger in the morning, by which he opened a blood vessel; that he bled very much, and became very weak; that he was sitting in a small pantry adjoining the state-room; that defendant came into the pantry, kicked him, struck him three times very hard, and dragged him into the state-room, and thence upon deck, by which he was so much bruised that he raised blood; nobody else had hold of him but the captain; he was sure the captain's brother had not; he had drank nothing but one glass of beer that day.

Alexander Stewart, defendant's brother, testified, that in the evening, towards dusk, he went into the pantry, and saw Jackson, who was asleep; witness called him, but received no answer. He then took hold of him, and dragged him into the state-room. Jackson asked him what the devil he did that for, and went back into the pantry. Believes Jackson was drunk, but will not say so positively. The cut in Jackson's finger was slight.

John Brewer's deposition read, from which it appeared that he was present, and saw the whole transaction. Alexander Stewart did drag Jackson out, but did not strike or kick him; neither did defendant strike or kick him.

George W. Whitlock testified, that at 9 o'clock Jackson got a glass of beer; at 11 a glass of rum, part of which he drank; at 5 he got a glass of gin: soon after another. He knows it because it was not paid for at the time. Jackson said his finger was slightly hurt.

Annanias Halsey saw defendant drag Jackson upon deck; defendant did not strike him; Jackson appeared to be in liquor that afternoon.

Robert Robertson. Jackson called on witness, who is an apothecary; the finger bled profusely; one of the small veins was cut.—Jackson had a large swelling from a blow in his groin, a lump on his head, and a hurt on the side of his face. Verdict, *not guilty*. *Mr. Price and Mr. Fay for the People, Mr. Davis for defendant.*

The People vs. George Grover.

Indictment for forging a check in the name of Benjamin Dibbs, on the Mechanics' Bank, for $180.

John Coats told prisoner that he must give him the check he had forged on Mr. Dibbs, and prisoner handed him the check now produced.

James Lean. Prisoner came to witness' store

with Edwards and Tittemerry. He there showed one check of $50, and another of $180, signed with the name of Benjamin Dibbs. Prisoner had also a cut check of Dibbs', which had been paid, and returned to him.

Benjamin Dibbs proves the check a forgery. The prisoner was in his store one day when witness left his desk open. Verdict, *not guilty*. *Rodman for defendant, Fay for the people.*

The People vs. Robert Matthews and George Matthews.

Indictment for assault and battery on Thomas Parsons, an apprentice of Robert Matthews. Verdict, *not guilty*. *Rodman for the people, Joseph D. Fay for defendant.*

The People vs. Timothy Foley and William Conrey.

Indictment for an assault on Ebenezer Boggs. The prosecutor swore that he was asked by one of the defendants, whether he believed that the prayers of a priest, after a man was dead, would send him to heaven? The witness declared his opinion that they would not; on which they called him a fool and rascal, and after some more abuse, collared and struck him. Verdict, *guilty*.

The People vs. Peter O'Reily.

Indictment for petit larceny in stealing a wood-saw and coat from George Fulmer. *Convicted.*

The People vs. James Quinn.

Indictment for an assault and battery on Luke Armstrong, who swore that defendant came to his door, and after a little talk, became angry and abusive. Witness ordered him off his stoop, whereupon defendant knocked him flat down on the walk, and remained there insulting witness for about twenty minutes. On his cross examination, witness said defendant knocked him down, but gave him no blow—he pushed witness down.

Bartholomew Clinton, for the defendant, said, that Armstrong pushed defendant first; afterwards the latter laid hold of Armstrong, and pulled him down.

David Nestle testified that defendant jerked Armstrong down on the walk, after he had been ordered off the premises. Verdict, *guilty*.

The People vs. Jacob Johnson, a slave of Carey Dunn, jun. Esq.

Indictment for stealing money from the trunk of his master, petit larceny. Convicted on his own confession, and sentenced to the Penitentiary for two years. *Price for the people, J. R. Scott for prisoner.*

The People vs. Lewis Tredwell, a black.

Indictment for stealing two coats, the property of Abraham K. Fish, grand larceny. It appeared that the prisoner had been but a few weeks discharged from the Penitentiary, and was a servant in the house, from the entry of which the coats were stolen. Verdict, *Guilty*. The prisoner was sentenced to four years imprisonment in the state prison. *Mr. Price for the people, Mr. Rodman (assigned by the court) for prisoner.*

The People vs. Nancy M'Kay.

Indictment for assault and battery on Hetty M'Ginnis; who swore prisoner came at her, and then she threw a bowl of water in her face; whereupon prisoner clenched her. Mr. Price told the prosecutrix they were at least even with one another; and the prisoner having been some time in bridewell, the jury *acquitted her*. *Price for the people. N. B. Graham, Esq. for defendant.*

The People vs. Captain Benham.

[Defendant's true name is Bennet.]

Indictment for an assault and battery on Abner Curtis, a marshal, and rescuing a prisoner from him, against whom he had process. Curtis went on board a sloop and inquired for the man against whom he had process; they denied that he was there; but he was on board and was found at dinner. After he had finished, he started to go on deck. Curtis was about to follow, when the door of the cabin was closed on him for two or three minutes. He afterwards took possession of his prisoner, who insisted on stopping to go into a grocery. There several persons interfered. A man stepped up and said the man should not go. David Reed caught him by the collar. Capt. Reed promised on his honour to take him to the Police. Curtis was separated from his prisoner in consequence, and then the prisoner ran off. Afterwards Curtis went again on board, and Philip Reed forced him back and shut the cabin door against him.—Verdict, *not guilty*. *Price for the people, H. Maxwell for defendant.*

The People vs. Joseph Anthony.

Indictment for an assault on Conrad Sweet. Defendant (he says) clenched him, and struck him, as he was standing against the stove, very violently. Witness had one hand in his breeches pocket, and in drawing it out some money came out with it, and was lost. This occurred in Anthony's house, who had ordered him out; and as he was turning to go out, he was pushed and struck.

James Ford, a witness for defendant, testified, that Anthony told Sweet to go out of his house; Sweet said it was a public house, and

he would not go out; then Anthony took hold of him to push him, but did not strike him; and the parties then went out into the street.

David Brooks confirms the testimony of the last witness.

Richard Melville also confirms this testimony.

John Smith, for the people, confirms Sweet's testimony. He says defendant struck Sweet several times, and pushed him against the wall of the house.

Ellen Anthony, the wife of the defendant, being called by his counsel as a witness, was rejected.

William Rodman, for the prosecution, also confirms Sweet's testimony. Sweet did not refuse to go out when ordered.

Jacob Hays swears John Smith's character is bad, and that he would not believe him on his oath. Smith acknowledges he has been convicted of forgery. Verdict, *not guilty*. *Price for the people, J. A. Graham for defendant.*

The People vs. William Ferguson.

Indictment for assault and battery on his wife. The prosecutrix testified that she was separated from her husband in 1813, for his ill usage of her, since which he assaulted her. She was proved to be a very excellent, hard working woman, and the defendant appeared, by the testimony of George B. Raymond, to be very worthless. Verdict, *guilty*. *Mr. Price for the people. Defendant did not appear.*

The People vs. Ellen Anthony.

Indictment for an assault and battery on John Smith, and biting his finger. *Gardner Fisher* saw her bite the finger very hard—heard it crack. She clenched him first. It appeared that she ordered the prosecutor to leave her house—he would not—she pushed him—he resisted—and then she bit him, "till her teeth met together." *Acquitted.*

The People vs. James Watson, a black.

Indictment for stealing a basket of cucumbers and a packet containing $16 in money, from a market woman at the market. Convicted, and sentenced to the Penitentiary for ten months.

The People vs. Fermey.

Indictment for an assault and battery on Thomas D. Coxin. The defendant had a fork in his hand and held it in a striking posture; and being thus armed, and in great anger, ran towards the prosecutor, as he supposes, with an intention to stab him. At the distance of about three yards, he was stopped by another person, and prevented from coming nearer. *The Recorder* decided, that if the jury were satisfied that he intended to stab the prosecutor, the defendant was guilty of an assault, although he did not come within striking distance. *Convicted. Fay for the people, Gardenier (assigned by the court) for defendant.*

The People vs. William Malloy.

Indictment for passing, and having in possession, a two dollar counterfeit note of the Phenix Bank. The prisoner had two of these notes, which were both sworn by *Edward W. Millagan*, a clerk of that Bank, to be forgeries, in his opinion. *David Lyon* testified that prisoner offered him this bill, for a glass of wine, and said he had no other money with him. Lucas paid for the wine. *George Corwin* testified that prisoner came to his store on the 5th July with *William Lucas*, and in pay for drink, threw down this bill, which was declared counterfeit; *Lucas* said, he had two shillings, and paid for the drink. They then went into one *Smith's* store; afterwards into Lyon's store. Witness having suspicion, had told Lyon and secured himself in the back room. There they offered the same bill. *Mr. Boggs*, the president of the Bank, proved this note to be a counterfeit. *Hugh M'Ewen* had received a bad two dollar note from prisoner, who afterwards took it back and gave good money for it; thinks the note was on the Phenix Bank. *Convicted. Van Wyck for the people, Rodman for defendant.*

The People vs. John Smith and John Williams, blacks.

Indictment for stealing a cheese from a grocery, petit larceny. Three blacks in the evening were seen together; two went into the store, one stood a little distance off. One of the two who went in, came out with a cheese, and was seized. The witness says, that neither of the prisoners is the one who had the cheese. *Raymond* the marshal, testified that Williams told him this morning, he was charged with stealing a cheese. *Acquitted. Col. Graham for defendant.*

The People vs. Moody Wood.

Indictment for stealing a cow from *Joseph Schnyder*. *Petit larceny*. The *defendant* and *Schnyder* are neighbours at Bloomingdale, and live about two or three hundred yards from each other. Schnyder had bought a cow, about the first of April last; and, on the 14th, had turned her out early in the morning upon the road, to provide during the day as well as she could, for herself. In the evening, and during the night, he waited anxiously for her return. It was his only cow; the first one he ever owned; and he had given ten dollars and

a silver watch for her. Morning came, but no cow. Poor Schnyder became disconsolate—he sallied forth into the highway—and as well as he could (for he is a German, and English words seem to lie so uneasy in his mouth, that they all come out *broken*) inquired of every one, "*Haf you seen mine gow? he's a niesh gow, mit pig horns, unt a pig dail.*" He called at Moody Wood's house, and related his misfortunes. "*Haf you seen mine gow, Moody Wood?*" Moody Wood had not seen the cow; so at least Moody Wood said. Moody Wood was very sorry for his honest and simple neighbour, Joseph Schnyder: for so Moody Wood said. "*Moody Wood ish a tealer in gows, unt sells millek.*" Schnyder employed him to search, and inquire for, and seek out his cow; and Moody Wood promised to set out upon the business without loss of time; and Joseph Schnyder promised to pay him three dollars if he found her. And Moody Wood went one way, and Jacob Schnyder another; and they searched, and looked, and inquired as much as they possibly could, day after day, but all to no purpose. Moody Wood came to the city and inquired every where, in every street and alley in the city; but no tidings could be gained concerning the cow. Unhappy Schnyder! Unfortunate Moody! The one could not get his cow, the other could not earn his three dollars. Jacob Schnyder had described his cow with all the minuteness possible, and by this description Moody Wood inquired for her. But alas! nobody knew her, nobody had seen her, nor any thing like her. Let what we have said be a warning to all honest people, never to employ Moody Wood to look for their stolen cows. For it turned out, in the sequel, that on that very morning, when poor Jacob Schnyder's cow was in the road, Moody Wood drove her into his premises, and by eight or nine o'clock in the morning, she was actually in full march, in company with three others, under the command of Isaac Cornell, for New-Rochelle, in Westchester county; all of them as incapable of resistance, and thinking as little of it, as a drove of southern negroes on the way to Missouri. And, therefore, we say again, let nobody ever ask Moody Wood about stolen cows—not because we mean to say that Moody Wood stole the cow, but because he never so much as recollected that he had sent just such a cow as Joseph Schnyder described to him, to New-Rochelle, only the day before. It will be a great deal better, on such an occasion, to speak to *Isaac Cornell*. For when Schnyder told him about the cow, and told him her marks, he said that he had driven that cow to New-Rochelle to sell for Moody Wood, who had given her in charge to him for that purpose; telling him at the same time, that he had bought her that morning of a man who was driving her along the road. Thereupon, Isaac Cornell and Joseph Schnyder went to Moody Wood's house; and then Moody Wood was so perfectly satisfied, that he had really sent the cow off to be sold, that he offered, and actually paid Schnyder fifteen dollars for the cow. What an instance of treacherous memory! When he was first spoken to, he never recollected that he had sent the cow off the morning before to Westchester. When he found that only the place where the cow was, was known, he instantly recognized it to be poor Joseph's cow; and was so fully satisfied that it was his, that he paid fifteen dollars to him without ever having him so much as to look at her, to see if it was her. The jury, actuated by a very kind, and perhaps praiseworthy commiseration for the poor man's treacherous memory, brought him in not guilty of the felony with which he was charged!

Van Wyck for the People.
Gen. Bogardus for the Defendant.

The People vs. *William Cook, Josiah Hager* and *John B. Smith.*

Indictment for stealing gold coins, the value amounting in the whole to $1560, the property of *Justus Sperzell. Grand Larceny.* Sperzell is a German, and coming to this city, took lodgings at the house of *Reuben Decker*, No. 4 Front-street. The above mentioned money was locked up in his trunk and the trunk itself was deposited in Mr. *Decker's* private bedroom, in the second story of the house, the door of which was also locked. On the evening of Saturday the first day of July, *Sperzell* was sitting quietly on the stoop. He ap-

pears to be a plain illiterate man; but of pretty strong intellect. While he was thus enjoying the cool and refreshing evening breeze, a Scotchman arrived with his bagpipes, and entering the house, suddenly "*struck up a lilt so gaily o*," and so loud withal, that, as one of the witnesses expressed it "you could not hear yourself talk." Hager and Cook were boarders in the house. They were all highly delighted with the music, and became of a sudden extremely generous, and even profuse, for "*Music hath charms to soothe the savage breast.*" They called for punch, which they had never called for, nor even drank there before, and they treated "the piper with his merry pipe;" and they treated every body that happened to come in, known and unknown, with punch in abundance. They pressed *Sperzell* at the door to drink; and for the first time, *Hager* became extremely sociable with *Mrs. Decker* and another woman in the house, whom he kept in conversation, while *Decker* was employed in the bar making punch, without intermission. So much merriment, and fun, and music, and noise, had never before been heard at *Decker's*, and, as he himself said, he hardly knew what to make of it, it seemed so new and strange to him. At last, however, the music ceased; the piper went his way; the crowd which had been drawn to hear him, retired; the call for punch was heard no more. Hager ceased to be chatty, and all was quiet. *Sperzell* began to be sleepy, for it was now near eleven o'clock, and took a candle for the purpose of going to bed. For men must sleep, those who have money, and those who have not—if they can. *Hager* proposed to accompany him, and they went together. When they arrived in the third story, where their bedrooms were, behold there was Sperzell's trunk, all broken to pieces, the clothes scattered about the floor, and every thing betokening "a deed of dreadful note." *Sperzell* looked for his money, but not a coin was to be found. And there he stood in mute despair, fallen, in one instant, from the height of affluence to abject poverty! When *Mr. Van Wyck* asked him if he was not very much frightened, the whole misery of his condition at the time seemed to recur to him; and with starting eyes, stifled breath, and tremulous voice, he replied, "*O Got, I was half die! I work four unt swanzig year for my money.*" He ran down stairs, groaning forth his misfortune, and soon the whole of Mr. Decker's establishment was a scene of uproar, dismay and consternation. A little reflection satisfied Mr. Decker, however, that the bagpipes were at the bottom of this robbery; and that as the money was stolen while they were playing and making such a noise that the breaking of the door above could not be heard, they must have been brought there with the view of aiding the robbers. Then it occurred to him that Cook had been several times after these noisy bagpipes that night, and that he and Hager had done all they could to keep the family down stairs. Upon this suspicion he had them both committed to the watchhouse. But what purpose could that answer? No money was found upon them; and so far from confessing any thing, they were incontinently indignant at being suspected of so heinous an offence. But the next morning the money was all found in the house of Mrs. Kirk, in Bancker-street, some stuck away in the garret, and the rest buried in the cellar! This was certainly a very happy discovery for poor *Sperzell*. But how came it about? In answer to this question, we beg leave to introduce to our readers a somewhat odd and out of the way, but we are entirely persuaded, a very honest, worthy and shrewd person by the name of

Richard Meriam, of the city of Albany, where he keeps a victualling cellar, satisfied with small earnings, in a humble, but honest course of industry. We take occasion to premise thus much, because, without seeing him, and hearing him, and marking him well, while testifying, some doubts might possibly be entertained of his integrity; the court, the jury and the audience had none. *Meriam* testified that he had been some time acquainted with Smith and Holden; that he fell in with Smith, a few days before the robbery, and was invited to come and see him at one Pomeroy's; (*corner of William and Spruce streets*) Smith owed him, and he hoped to get his pay, and so went to Pomeroy's, where he was made acquainted with Cook

and Hager, by Smith; these three appearing well acquainted with each other. On *Friday*, he saw Smith have a three dollar bill, and asked him for it in part payment. Smith said it was the last of twenty dollars, and he could not part with it; but added, that he "*would soon be flush, for there was a heavy load coming on somebody.*" Meriam asked him, *how?* Smith replied that there was a fellow at the same house where Cook and Hager boarded, who had one or two thousand dollars in cash; that Cook knew the situation of it, and Holden had seen the room it was in, and knew how to get at it. Holden, he added, was to get the money. On Saturday he saw all four of them together. Meriam had intended to go that night in a sloop for Albany, but as he did not reach the wharf in time, she started with his trunk on board, without him, and left him behind; and then he went to the sloop Hardware, Captain Coughtry, of Albany, being intimately acquainted with Mr. Cheeny, her pilot. He staid conversing there till about nine o'clock, when Cook came on board and hallooed for *Sandy*, the piper, to come on deck, whom he requested to go to Hager's to play the bagpipes; but Sandy said he could not go, being already engaged to play on board the sloop, that evening. Cook insisted he should go, reminded him that he had the day before promised to go, and that he might be back in half an hour. Meriam then enquired of Cook what he wanted the bagpipes for? Cook said, to play for a company where he boarded. After a little conversation, he touched Meriam on the shoulder, and they went aside. Cook then said to him, "You are a stranger to me; but Smith says he is well acquainted with you, and has hinted our plan to you."

Meriam. "Not much of it."

Cook. "Well, there is a Dutchman where I board, who has a great deal of money, all in gold: I have seen it to-day, and I want Sandy to come and play, and make all the noise he can, while Holden or Smith gets the money. Holden has been pitched on to get the money, for he knows where it is. Hager and I are to stay below, to keep the company in tow, while they are getting the money. And if we get it, it is to be taken to Smith's house, where he boards, in Bancker-street, and we are all to go there in the morning to divide it."

"And the money (said Meriam) did go there; I saw it counted there that night."

Resuming his narrative, however, he said that Sandy did not go with the bagpipes just then. Meriam asked Cook where the place was? Cook told him, "keep behind me, and you'll see where I go in." Meriam did so, and went into Decker's and had a glass of brandy. Hager and Cook were sitting in the room, but the bagpipes had not yet come, when Meriam left the house. He did not enter it again. On his return towards the sloop, he met Smith and Holden at the corner of the street. Smith's dress was changed. He had on sailor's clothes. Soon afterwards, the bagpipes began to play. He remained in the street, and walked on the side opposite Decker's. "*It looked a kind o'dark to me* (said he) *how they could steal the money when every body was up; I didn't think it could be done, and I wanted to see the end on't.*" (Meriam appeared to be a New-Englandman.) After a while, Cook came out and turned the corner, walking very fast. M. followed him. Cook went up to a house and hallooed, "*Holden!*" The house was shut; at length a man, it was Smith, opened a window, and told him Holden had the money, and was gone to Mrs. Kirk's with it. Cook told M. to follow Smith to the house, which he did. There he found Holden, who said he had the money, and produced it. They counted it in a bedroom, and there were upwards of three hundred pieces of gold. M. asked Holden what he was going to do with it: he replied he was going to sleep with it under his head. Mrs. Kirk said, "let me have it; I'll *plant* it." Holden persisted. They invited M. to stay and sleep there, which he refused, *he "had seen enough."* They asked him to walk by Decker's and see what movements were going on. But he went directly to the sloop and waked the pilot. It was now after midnight. He told the pilot he wanted to tell him something. The pilot said he was sleepy and would not get up, and told him to turn in and tell what he had to say, in the morning. When he waked up, he awoke the pilot, and told him the whole. Then they went on deck, and were told that Capt. Coughtry had

been sent for to the police by Cook, to speak in favour of his character. The captain soon returned, and then they told him "all about it" The three then went to Decker's, where they found nobody at home but a woman; then to the police office; but, it being Sunday, they found no one there. This was about six o'clock. Then they went to Mr. Warner, the police justice, and told him. Then they went after some police marshals, and having procured them, proceeded to Mrs. Kirk's. M. went in alone. Mrs. K. said, "I am dead! why they'll have Smith. But the money is safe: I've *planted it.*" She wanted him to sit. He desired her to tell where the money was, but she refused. He then returned to the officers, and they went in and searched, and ultimately found it. At first they returned without it, after having searched the house, as they supposed, thoroughly, and digging the whole cellar up. Meriam insisted on their going back—he was sure the money was there, for Mrs. K. had told him it was *planted.* They did go back; and at last found it behind a stone in the wall under ground.

Meriam was now put under a very severe and long cross examination by *Mr. Price;* who is certainly one of our most able and burthensome cross-examiners. But Meriam bore him along with great ease and good temper, and made not one false step; and at length Mr. Price gave him up—the rider more fatigued than the steed. *Mr. Rodman and Mr. Scott* then took him in hand, but all to no purpose. When asked why he did not immediately inform Decker, and thus prevent the robbery: he replied, that Smith frequently told him strange stories, and he didn't half believe him, for he didn't think it possible it could be done. He hardly knew what to make of it, nor how he ought to proceed. He was a stranger, and if he went and told, they would all turn on him, and call him a liar, and nobody would believe him, for he could not prove it; and, therefore, he thought best to keep still till morning, then they could all be taken at Mrs. Kirk's, for they were to go there the next morning, and the money would be recovered, and thus he was sure he could bring them to justice; and it was best to let them go on, for then he could prove every thing against them.

Reuben Decker testified that Cook and Hager, on Saturday, affected to be quite ill, and frequently went up stairs to lie down. At night, however, they were vastly better. *Smith* came in the evening in sailor's clothes—said he had shipped. He appeared a little intoxicated, and drank some there. He went in and out frequently. So did Cook. Hager and Cook affected entire ignorance of Smith. Cook went out often, and Hager talked with the women; he himself was kept constantly making punch, and the bagpipes were going at a great rate. Every body that came in was treated. He saw Cook once whispering to Smith. When it was discovered that the money was gone, *Sperzell* made "a terrible noise." Decker told his boarders he must take them to the watchhouse. Cook refused to go—called him a damned rascal; swore he would be the death of him if he took him there. Decker, however, persisted, and Cook and Hager were taken there by the watch. They both positively denied all knowledge of Smith. Smith was also apprehended, but Holden made his escape. [*He has since been taken at Albany, and is now in bridewell here.*]

It was proved by a variety of witnesses, that Cook and Hager were very intimate with Smith.

Adeline Hankerson, a German woman, housekeeper to Pomeroy, heard of the robbery on Sunday morning. She had heard Smith speak of the "*Dutchman's money,*" saying he should like to get hold of it; and now told Smith she pitied the poor Dutchman, he cried so about his money. "*Let him cry and be d—d,* (said Smith) *I've got it.*"

Hager, in his examination, admitted that Cook had on Saturday told him, they "might easily do the Dutchman out of his money;" but denied all knowledge of the felony.

Noah Pomeroy, at whose house the *gentlemen* had been in the habit of meeting daily, testified that he had known Hager for ten years; first knew him when he was a deputy sheriff of Schoharie county; and described him as "a respectable man."

Mr. Van Wyck. Did you ever know him in this city? *Yes, sir.* Did you ever know

him in the state prison? *Yes, sir.* Was you in the habit of seeing him there, day after day?

Mr. Price objected. It was evidently intended (he said) to prove that Hager had been a state prison convict; but that could be proved only by the record of his conviction. The court sustained the objection.

Mr. Van Wyck. Have you ever seen Cook in the state prison? The witness said it was an improper question, and the court said it was improper.

Pomeroy again asserted that Hager was a respectable man, and had always kept "respectable company."

Mr. Van Wyck. Have you not been day after day with him, for a year together, in the state prison? The witness refused to answer. No farther attempt was made to prove Hager's character to be good.

John P. Rome, formerly one of the assistant keepers of the state prison, was then called by the district attorney.

Have you ever known Hager? *Yes, sir, some years ago.* What was his character then? *That of a convict in the state prison.* Objected to.

Have you ever known Pomeroy? *Yes, sir.* What was his character? *The same as Hager's.* Objected to.

Would you believe him on his oath? *No—I would not.*

It was now quite clear (*and so the truth in fact is*) that Hager, Cook, and Pomeroy, had been in the state prison together.

Mr. Scott for Smith, and *Mr. Price* and *Mr. Rodman* for Hager and Cook, now summed up the cause with considerable ability, especially Mr. Price; who placed the defence on this ground: That if *Meriam* was to be believed, Smith and Cook were certainly guilty; but that Hager, concerning whom Meriam had testified nothing, was not proved to have been guilty. As to the credibility of *Meriam*, he said, that he was either exceedingly honest, or he was one of the veriest villains that ever lived. He urged to the jury, that it was inconceivable that M. should have been so entirely trusted, if he had not been in the plot with those who had perpetrated the robbery; and that the disclosures he made were extorted by the fear of being himself implicated, when he heard that Cook was taken up, he having been at Decker's house the night of the felony. And if he had actually participated in the robbery, he was not entitled to credit; and, therefore, as none of the money was found upon any of the prisoners, nor any fact proved against them by any witness but Meriam, the jury ought to acquit them all. If the jury should, however, consider M. not to have been an accomplice, and therefore entitled to credit, they would discriminate between Hager and the two others. All that could be alleged against him was, that he had concealed the propositions Cook had made to him, until his examination, and had been sociable with the women. But in concealing what he did, he had done only what Meriam himself had done. That Meriam's story inculpated himself much more than it did Hager: for he had gone with the money to Kirk's, had seen it and counted it. What would have been his condition then, said Mr. Price, if at that moment the police officers had burst in upon him? He could not possibly have escaped a conviction. And yet Hager is to be convicted upon the same sort of evidence, though far more slight, which exists against Meriam, and by the same jury who believe M. so innocent, that they can found a verdict on his oath alone! As to Hager's conduct in the house when the felony was committed, and the bagpipes were playing, he endeavoured to show that it might very well have proceeded from motives perfectly innocent.

Mr. Van Wyck for the people, placed the question on the same ground Mr. Price had done; but insisted that no suspicion could be entertained of Meriam's veracity or integrity. He was the man who ought to be thanked for the detection of this robbery, and the restoration of the money. He insisted that M. did right to keep the matter to himself, both because he would not have been believed if he had made a premature disclosure, and because it was desirable that the prisoners should be left to commit the crime, that they might be secured and convicted. He then went into a detail of all the circumstances, and showed conclusively the guilt of all the prisoners. And concluded by express-

ing his clear opinion that Meriam was to be honoured for his integrity and address.

Mr. Jay, the Recorder, whose charges to the jury are remarkable for their point and clearness, and especially for their *brevity*, recounted the testimony with great perspicuity. He mentioned the long and able cross-examination to which Meriam had been subjected, and which resulted in the same story he told on his direct examination; nor was it either inconsistent in itself, or contradicted in the minutest particular by any other witness; but much of it, on the contrary, was supported by them. Many another man might have acted differently from Meriam. But he was a stranger here, ignorant of what he ought to do, and fearful of injuring himself if he made disclosures which he could not prove. After all, however, the result proved that he had not acted very indiscreetly; because every thing has turned out exactly as he had intended. The money was recovered and the thieves secured. A man might very well act as he had done, and be honest at the same time. Upon the whole, he saw no reason for disbelieving Meriam, and if the jury were of that opinion, they must convict Smith and Cook certainly. He then recapitulated the circumstances which connected Hager with the transaction, and committed the cause to the jury.

The jury retired for about a quarter of an hour, and returned with a verdict of guilty against all the prisoners.

Mr. Price moved in arrest of judgment, for an alleged error in the indictment, which was argued on Saturday, the 15th, and judgment suspended till the next Sessions.

The People vs. *James Robertson.*

Indictment for assault and battery on *Mary Pendergast*, a girl about fifteen years of age. She was a servant in Mr. Robertson's family, taking care of his child. He pleaded guilty to the indictment, submitted an affidavit to the court explaining the circumstances, and was fined five dollars and the costs.

The People vs. *David Smith.*

Indictment for an assault and battery on *Thomas Donelon*. The prosecutor is an Irishman. He went about with oranges, and a few proof glasses, to sell. The defendant bought an orange of him for a shilling, and after he had it, would give only sixpence, and was going off without paying any thing. Donelon then took hold of him, when Smith thumped him, stampt on him, scattered his oranges, and broke his proof glasses; and swore lustily he would thrash any body that took poor Pat's part. *He was convicted, and sentenced to thirty days confinement in bridewell.*

The People vs. *John L. Decoust.*

Indictment for an assault and battery on *Matthias Goodeson*, a black man. The defendant was a good deal "disguised in liquor," and making much disturbance in the streets. The watchman expostulated with him several times; bidding him be quiet and go home. At this the defendant took umbrage, clenched the watchman, got him down, and tore his clothes; the watchman got up; the defendant got him down again; again he got up, and again he was taken down. At length, the nocturnal hero was apprehended and secured. *The jury found him guilty, and the court gave him fourteen days imprisonment in bridewell, to enjoy the "Pleasures of Memory."*

Scott for defendant.

The People vs. *Jane Tredwell & Susan Dean.*

These were coloured ladies from Bancker-street, and were indicted for stealing a frock, gown, and three blankets, from Ephraim Atwood. Miss Jane was convicted, and Miss Susan acquitted.

The People vs. *Bridget Carrol.*

Indictment for an assault and battery on *Margaret Fennel*, who testified that Bridget came to her house in a great rage, inquiring for her husband, swearing that Margaret kept him, and frightened poor Maggy so much, that she was obliged to hide herself, which she did so effectually, that Bridget was unable to find her. *Van Wyck.* Then she did not find you? *No, sir. Court.* And she did not strike you neither? *No, sir; she could not find me.* She did not touch you at all? *No, sir. The defendant was acquitted, after having been several days in confinement in bridewell on this charge.*

The People vs. *Mary Collins, a black.*

Indictment for an assault and battery on *William Douglass, a black.* He testified that defendant struck him without provocation; that he complained to the police; after which, she met him, and said she would give him something to complain of. She was a stout wench, and laying hold of him, bit him dreadfully in his hand, (*he showed the wound*) and he got away from her with difficulty. Polly Lyon was by and confirmed the whole of this story. All the parties are from Bancker-street. *Mr. Price*, for the defendant, told the jury they could not believe such witnesses; to which *Mr. Van Wyck* replied, they could find none better in Bancker-street. And the jury, after debating the matter about half an hour, returned with a verdict of *not guilty!*

Price for defendant.

The People vs. *Henry Ten Eyck.*

The prisoner was convicted of stealing a hat from the store of *George Truman*, in Chatham-street, and sentenced to the penitentiary for nine months.

The People vs. *Mary Ann Marshall.*

This lady was convicted of stealing a muslin frock, a towel, and black silk handkerchief, from *Sarah Roberts*, and sentenced to the bridewell for thirty days.

The People vs. *Samuel Van Dyke.*

Indictment for stealing a watch from *Thomas Devereaux.* The property was not found on him, but he confessed the stealing of it, in consequence of Devereaux promising to release him if he would confess. This confession was rejected, and the prisoner acquitted.

Gardenier for the prisoner.

The People vs. *Thomas Walker.*

Charged with keeping a disorderly house; *but acquitted.*

The People vs. *Marinus Johnson.*

Charged with keeping a disorderly house, No. 7 Cheapside-street. Verdict guilty, and defendant sentenced to pay a fine of five dollars and the costs.

SENTENCES

Passed by the Court of General Sessions, in and for the City and County of New-York, during the terms of June and July, 1820.

GRAND LARCENY.

June Term.

Thomas Franklin,	State Prison,	3 years.
George Smith,	do.	5 do.
Robert Graham, *al.* Thompson,	do.	5 do.

July Term.

William Fairchild,	State Prison,	3 years.
William Barnard,	do.	5 do.
Samuel M'Dowell,	do.	10 do.
James Farrell,	do.	10 do.
William Kelly,	do.	3 do.
Lewis Tredwell,	do.	4 do.
Louisa Morris,	do.	3 do.
John Edwards,	do.	3 do

SWINDLING.

June Term.

Zouman Cummings, State Prison, 3 years.

PASSING FORGED NOTES.

July Term.

William Mulloy, State Prison, 7 years.

PETIT LARCENY.

June Term.

William Ball,	Penitentiary,	3 years.
Mary Brown,	do.	do.
Lucretia Johnson,	do.	do.
Mary Duncan,	do.	do.
Catherine Daniels,	do.	do.
David Whitman,	do.	do.
William Brown,	do.	do.
Henry Thompson,	do.	do.
Edward Olson,	do.	2 years.
Emeline Williams,	do.	do.
Thomas Blackwell,	do.	do.
Joseph Van Cleef,	do.	do.
William Crawley,	do.	21 months.
William Johnson,	do.	do.
John Richards,	do.	do.
Samuel Allen,	do.	do.
Hannah Johnson,	do.	1 year.
James Handry,	do.	do.
James Burnet,	do.	do.
George Linmore,	do.	do.
John Shinn,	do.	do.

William Williams,	do.	do.
Phebe Sands,	do.	do.
Charles Tredwell,	do.	do.
John Parris,	do.	do.
Margaret Davis,	do.	do.

July Term.

William Cannon,	Penitentiary,	3 years.
William Thompson,	do.	2 do.
Jacob Johnson,	do.	do.
Francis Johnson,	do.	1 year.
Abraham Watson,	do.	10 months.
Peter O'Reilly,	Bridewell,	1 year.
Martha Erwin,	Penitentiary,	3 months.
Jane Tredwell,	do.	do.
Henry Ten Eyck,	do.	9 months.
Juliann Marshall,	Bridewell,	30 days.

ASSAULTS AND BATTERIES.

June Term.

Peter Wolf, Bridewell,	60 days.
Peter Burns, do.	10 do.
Charles Johnson, do.	do.
Robert Remsey, do.	60 days.
John C. Teale,	fined $25 and costs.
Edward Quinn,	$15 and do.
James Johnson,	$15 and do.
Henry Johnson,	$10 and do.
Henry Purdy, jun.	$10 and do.
Holly Peat,	$5 and do.
William B. Jaques,	$5 and do.
Robert Evans,	6 cents.
Samuel Primus,	6 cents.

NUISANCE.

George Wallace, Bridewell,	60 days.
Charles Phillips, do.	do.

RIOT.

Luke Lane, fined,	$15 and costs.
Jacob Pessenger, do.	do.
John Power, do.	do.
Henry Flenden, do.	$5 and costs.

ASSAULTS AND BATTERIES.

July Term.

Michael Connelly,	Penitentiary,	4 months.
——— Fermay,	do.	30 days.
John L. De Cost,	Bridewell,	14 days.
David Smith,	do.	30 do.
Richard Robinson,	do.	7 do.
John Smith,	fined $25 and costs.	
John D. Walsh,	$10 and do.	
James Burns,	$15 and do.	
William Conroy,	$10 and do.	
Timothy Foley,	$10 and do.	
James Quinn,	$5 and do.	
William Ferguson,	6 cents.	
James Robertson,	$5 and costs.	
Martin Burke,	$25 and do.	
William Ray,	6 cents.	
John H. Clapp,	6 cents and costs.	

DISORDERLY HOUSE.

Marinus Johnson,	fined $5 and costs.

KEEPING HOGS.

Isaac Baptiste,	fined $10 and costs.

RECAPITULATION.

Grand Larceny,	June Term,	3
Do.	July do.	9
Swindling,	June do.	1
Passing forged notes,	July Term,	1
	Total,	14
Petit Larceny,	June Term,	26
Do.	July do.	10
	Total,	36
Assaults and Batteries,	June Term,	13
Do.	July do.	16
	Total,	29
Nuisances,	June Term,	1
Do.	July do.	1
	Total,	2
Riots,	June Term,	4

Total of Sentences in two months, 85.

NEW-YORK SUPREME COURT.

Opinion of Chief Justice SPENCER, in the case of *Robert M. Goodwin* ads. *The People.*

A motion has been made to discharge the defendant, on the ground that it appears by the return to the certiorari, that he was once tried, and, therefore, cannot legally be tried again. He was indicted in the Sessions in New-York for manslaughter; the trial continued for five days, and the jury having received the charge of the court, retired to consider of their verdict, were kept together seventeen hours, and declaring there was no probability of their agreeing in their verdict, were discharged after eleven o'clock, on the last day in

which the court could sit. It appears that the jury had, in the mean time, between their receiving the charge of the court and their discharge, come into court, and on being asked if they had agreed on their verdict, answered, through their foreman, that they had agreed, and that they found the prisoner guilty; but recommended him to mercy; but, on being polled, the third juror called upon declared his disagreement to the verdict. These are all the facts material to be noticed in considering the present motion.

The defendant's counsel rely principally on the fifth article of the amendment to the constitution of the United States, which contains this provision: "*Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.*" It has been urged by the prisoner's counsel, that this constitutional provision operates upon state courts *proprio vigore*. This has been denied on the other side. I do not consider it material whether this provision be considered as extending to the state tribunals or not; the principle is a sound and fundamental one of the common law, that no man shall be twice put in jeopardy of life or limb for the same offence. I am, however, inclined to the opinion, that the article in question does extend to all judicial tribunals in the United States, whether constituted by the congress of the United States, or the states individually. The provision is general in its nature, and unrestricted in its terms; and the sixth article of the constitution declares, that that constitution should be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws in any state to the contrary notwithstanding. These general and comprehensive expressions, extend the provisions of the constitution of the United States, to every article which is not confined by the subject matter to the national government, and is equally applicable to states. Be this as it may, the principle is undeniable, that no person can be twice put in jeopardy of life or limb for the same offence.

The expression, *jeopardy of limb*, was used in reference to the nature of the offence, and not to designate the punishment for an offence; for no such punishment as loss of limb was inflicted by the laws of any of the states at the adoption of the constitution. Punishment by deprivation of the limbs of the offender, would be abhorrent to the feelings and opinions of the enlightened age in which the constitution was adopted, and it had grown into disuse in England for a long period antecedently. We must understand the terms, jeopardy of limb, as referring to offences which, in former ages, were punishable by dismemberment, and as intending to comprise the crimes denominated in the law, felonies.

The crime of manslaughter is undoubtedly a felony; and, therefore, the prisoner is entitled to the protection afforded by the article of the constitution, whether we regard it as binding upon us by its own force, or as an acknowledged axiom of the common law.

The question then recurs—what is the meaning of the rule, that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb. Upon the fullest consideration which I have been able to bestow on the subject, I am satisfied that it means no more than this:—*That no man shall be twice tried for the same offence.* Should it be said, that we can scarcely conceive that a principle so universally acknowledged and so interwoven in our institutions, should need an explicit and solemn recognition in the fundamental principles of the government of the United States, we need recur only to the history of that period, and to some other of the amendments, in proof of the assertion, that there existed such a jealousy, or extreme caution, on the part of the state governments, as to require an explicit avowal in that instrument, of some of the plainest and best established principles, in relation to the rights of the citizens and the rules of the common law. The first article of the amendments prohibits congress from making any law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition government for a redress of grievances. The second secures the right of the people to bear arms; and, indeed, without going into them minutely, nearly all the amendments

of that instrument indicate either great caution in defining the powers of the national government, and the rights of the people, and the states, or they evince a jealousy and apprehension that their fundamental rights might be infringed, so as to leave no doubt, that by the article under consideration, no new principle was intended to be introduced. The test by which to decide whether a person has been once tried, is perfectly familiar to every lawyer; it can only be by a plea of *antrefois acquit*, or a plea of *antrefois convict*. The plea of a former acquittal, Judge *Blackstone* says, (4 *Com.* 335) is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence; and since, he says, it is allowed as a consequence, that where a man is once fairly found not guilty upon an indictment, or other prosecution, before any court, having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. The plea of a former conviction depends on the same principle, that no man ought twice to be brought in danger for the same crime. To render the plea of a former acquittal a bar, it must be a legal acquittal by judgment upon trial, for substantially the same offence, by a verdict of a petit jury. (1 *Chitty's Crim. Law*, p. 372.) In the present case, it is not pretended that the prisoner has been acquitted, unless the discharge of the jury, without having agreed on their verdict, and without the prisoner's consent, shall amount in judgment of law to an acquittal. This brings us to the question, whether the Court of Sessions could discharge the jury under the circumstances of this case. If they could not, then I should be of the opinion, that although there could be no technical plea of *antrefois acquit*, the same matter might be moved in arrest of judgment: and if so, I can see no objection to the discussion of the question in its present shape, on a motion to discharge the prisoner.

In the case of the *People* vs. *Olcott*, (2 *Johns. Cases*, 301) all the authorities then extant upon the powers of the court to discharge a jury in criminal cases, and the consequence of such discharge, were very ably and elaborately examined by Mr. Justice *Kent*, and it would be an unpardonable waste of time to enter upon a re-examination of them. In that case, the jury, after having remained out from eight o'clock on Saturday evening, until nearly two o'clock the next day; and having, in the mean time, come into court two or three times for advice, declared that there was no prospect of their agreeing in a verdict, and were discharged without the consent of the prisoner: one of the questions was, whether the discharge of the jury entitled the defendant to be discharged, or, whether he could be re-tried. After examining and commenting on all the authorities, the position of the learned judge was this: "If the court are satisfied that the jury have made long and unavailing efforts to agree, that they are so far exhausted as to be incapable of further discussion and deliberation, this becomes a case of necessity, and requires an interference." He observed, "all the authorities admit that when a juror becomes mentally disabled, by sickness or intoxication, it is proper to discharge the jury; and whether the mental disability be produced by sickness, fatigue, or incurable prejudice, the application of the principle must be the same." Again he observed, "Every question of this kind must rest with the court under all the particular or peculiar circumstances of the case. There is no alternative; either the court must determine when it is requisite to discharge, or the rule must be inflexible, that after the jury are once sworn, no other jury can in any event be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge of that necessity, and to determine what combination of circumstances will create one." The learned judge inveighs, with force and eloquence, against the monstrous doctrine of compelling a jury to unanimity by the pains of hunger and fatigue, so that the verdict is not founded on temperate discussion, but on strength of body. Although the case of the *People* vs. *Olcott*, was a cause of misdemeanor, the reasoning is, in my judgment, entirely applicable to cases of felony; and although the opinion was confined

to the case under consideration, a perusal of it will show that it embraces every possible case of a trial for crimes. The opinion was delivered in 1801, and since then, this question has come under consideration in several cases. In the case of the *King* vs. *Edwards*, (4 *Taunt.* p. 309) the indictment was for a felony; and while the prosecutor was giving his evidence, one of the jurors fell down in a fit; and he was pronounced by a physician, on oath, incapable of proceeding in his duty as a juryman that day. Whereupon the jury was discharged, and a new jury sworn, and the defendant was convicted. The point whether the prisoner could be tried after the discharge of the jury without the prisoner's consent, was argued before the judges of England, except *Mansfield*, chief justice, and *Lawrence*, justice—all the cases were cited; and the judges, without hearing the counsel for the crown, said that it had been decided in so many cases, it was now the settled law of the country, and gave judgment against the prisoner. The same course was adopted upon nearly the same state of facts, in *Ann Scullent's case*, (*Leach's C. L.* p. 700) and in the case of the *King* vs. *Stevenson*, (*Leach*, 618.) The prisoner fell down in a fit during the trial, and the jury was discharged; and, upon his recovery, he was tried and convicted by another jury. In the case of the *United States* vs. *Coolidge*, (2 *Gallison*, p. 364,) a witness refusing to be sworn, the trial was suspended during the imprisonment of the witness for the contempt; and Mr. Justice *Story* held, that the discretion to discharge a jury existed in all cases; but that it was to be exercised only in very extraordinary striking circumstances. And in the case of the *Commonwealth* vs. *Bowden*, (9 *Mass. Rep.* p. 494) upon an indictment for highway robbery, the jury, after a full hearing of the case, being confined together during part of the day and a whole night, returned into court and informed the judge they had not agreed on a verdict, and it was not probable they ever could agree; whereupon one of the jurors was withdrawn from the panel without the defendant's consent, and the jury was discharged; and during the same term, another jury was empannelled for his trial, and he was found guilty. On a motion in arrest of judgment, the court refused the motion, saying, that the ancient strictness of the law upon this subject, had very much abated in the English courts; that it would neither be consistent with the genius of our government or laws, to use compulsory means to effect an agreement among jurors: that the practice of withdrawing a juror where there existed no prospect of a verdict, had frequently been adopted in criminal trials in that court.

Upon a full consideration I am of opinion, that although the power of discharging the jury is a delicate and highly important trust, yet that it does exist in cases of extreme and absolute necessity; and that it may be exercised without operating as an acquittal of the defendant: that it extends as well to felonies as to misdemeanors; and that it exists and may discreetly be exercised, in cases when the jury, from the length of time they have been considering a case, and their inability to agree, may be fairly presumed as never likely to agree, unless compelled so to do, from the pressing calls of famine or bodily exhaustion. In the present case, considering the great length of time the jury had been out, and that the period for which the court could legally sit as nearly terminated, and that it was morally certain the jury could not agree before the court must adjourn, I think the exercise of the power was discreet and legal.

Much stress has been placed on the fact that the defendant was in jeopardy, during the time the jury were deliberating. It is true that his situation was critical; and there was danger, as regards him, that the jury might agree on a verdict of guilty; but, in a legal sense, he was not in jeopardy, so that it would exonerate him from another trial. He has not been tried for the offence imputed to him: to render the trial complete and perfect, there should have been a verdict either for or against him. A literal observance of the constitutional provision would extend to embrace those cases where, by the visitation of God, one of the jurors should either die or become utterly unable to proceed in the trial. It would extend also to a case where the defendant should be seized with a fit, and become incapable of attend-

ing to his defence; and it would extend to a case where the jury was necessarily discharged in consequence of the termination of the powers of the court. In a legal sense, therefore, a defendant is not once put in jeopardy until the verdict of the jury is rendered against him. If for or against him, he can never be drawn in question again for the same offence. And I entirely concur in reprobating the proceeding of withdrawing a juror and attempting to subject a person to a second trial, because the public prosecutor was not prepared with his proofs. In the case of the *People* vs. *Barrett & Ward*, (2 *Caines*, 304) this court considered it equivalent to an acquittal.

The only remaining inquiry is, whether the power of discharging the jury in this case, could be exercised by the Sessions.

The Court of General Sessions for the city of New-York is clothed with powers not entrusted to the General Sessions of any other county. It has the power to try for all crimes, (cases affecting life only excepted) in as full and complete a manner as any court of Oyer and Terminer and Jail Delivery, for the said city and county, can hear, determine or adjudge the same. (2 *Rev. Laws*, 503.) It is not necessary now to decide whether the Sessions in New-York, since the statute, can grant a new trial on the merits; but having as full and perfect a jurisdiction as the Oyer and Terminer and Jail Delivery, excepting in cases of life, over all other crimes, no doubt can be entertained that they possess all the incidents appertaining to the power of trying for these offences; and the right to discharge the jury, under the facts and circumstances of this case, was an incident to the trial. And, upon the whole, I am of opinion, that whenever, in cases of felony, a jury has deliberated so long upon a prisoner's case as to preclude a reasonable expectation that they will agree in a verdict, without being compelled to do so from famine or exhaustion, that it becomes a case of necessity, and that they may be discharged, and the prisoner may be again tried. In the present case, we consider the discharge of the jury as a discreet exercise of the powers of that court, either on the ground that the jury had been kept together so long as to preclude all hope of their agreeing, unless compelled by famine or exhaustion, or on the ground that the powers of the court were to terminate within a few minutes, and that it was morally certain the jury could not agree within that period; and this produced an absolute necessity for discharging them.

In this opinion my brethren entirely concur, and the consequence is, that Goodwin must be tried at the next Sittings; and his recognisance, and that of his sureties, will be respited until the next January term. Rule accordingly.

Case of James Crow, alias Thomas Geddely, who was executed at York, England, for a Burglary, in the year 1727.

Thomas Geddely lived, as a waiter, with Mrs. Hannah Williams, who kept a public house at York. It being a house of much business, and the mistress very assiduous therein, she was deemed in wealthy circumstances. One morning her scrutoire was found broken open and robbed, and Thomas Geddely disappearing at the same time, there was no doubt left as to the robber. About a twelvemonth after, a man calling himself James Crow, came to York, and worked a few days, for a precarious subsistence, in carrying goods as a porter. By this time he had been seen by many, who accosted him as Thomas Geddely. He declared he did not know them, that his name was James Crow, and that he never was at York before: this was held as merely a trick, to save himself from the consequences of the robbery committed in the house of Mrs. Williams, when he lived with her as waiter.

His mistress was sent for, and, in the midst of many people, instantly singled him out; called him by his name, (Thomas Geddely) and charged him with his unfaithfulness and ingratitude in robbing her.

He was directly hurried before a justice of the peace, but, on his examination, absolutely affirmed, that he was not Thomas Geddely, that he knew no such person, that he never was at York before, and that his name was James Crow. Not, however, giving a good account of himself, but rather admitting himself to be a vagabond and a petty rogue, and Mrs. Williams

and another, swearing positively to his person, he was committed to York Castle, for trial at the next assizes.

On arraignment, he pleaded—not guilty, still denying that he was the person he was taken for; but Mrs. Williams, and some others, swearing that he was the identical Thomas Geddely, who lived with her when she was robbed, and who went off immediately on the commitment of the robbery, and a servant girl deposing that she saw him that very morning, in the room where the scrutoire was broke open, with a poker in his hand, and the prisoner being unable to prove an alibi, he was found guilty of the robbery. He was soon after executed, but persisted, to his latest breath, that he was not Thomas Geddely, and that his name was James Crow.

And so it proved! For, some time after, the true Thomas Geddely, who, on robbing his mistress, had fled from York to Ireland, was taken up in Dublin for a crime of the same stamp, and there condemned and executed. Between his conviction and execution, and again at the fatal tree, he confessed himself to be the very Thomas Geddely who had committed the robbery at York, for which the unfortunate James Crow had been executed.

We must add, that a gentleman, an inhabitant of York, happening to be in Dublin at the time of Geddely's trial and execution, and who knew him when he lived with Mrs. Williams, declared that the resemblance between the two men was so exceedingly great, that it was next to impossible for the nicest eye to have distinguished their persons asunder.

Case of John Miles, who was executed at Exeter, Eng. for the murder of William Ridley.

William Ridley kept the Red Cow, a public house, at Exeter. John Miles was an old acquaintance of Ridley's, but they had not seen each other for some time. (Miles living some distance off) when they met one morning, as the latter was going a little way to receive some money. They adjourned to the next public house, and, after drinking together, Ridley told Miles that he must go about the business which brought him from home, which was to receive a sum of money, but made him promise to wait for his coming back. Ridley returned, and they drank together again. Ridley now insisted upon Miles's accompanying him home to dinner. They dined, they drank, they shook hands, repeated old stories, drank and shook hands again and again, as old acquaintances in the lower class, after long absences, usually do; in fine, they both got, at last, pretty much in liquor.

The room they sat in was backwards, detached as it were from the house, with a door that went immediately into a yard, and had communication with the street, without passing through the house.

As it grew late, Mrs. Ridley at length came into the room, and not seeing her husband there, made inquiry after him of Miles. Miles being much intoxicated, all that could be got out of him was, that Ridley went out into the yard some time before, as he supposed, on account of there being no chamber-pot in the room, and had not returned. Ridley was called, Ridley was searched after, by all the family; but neither answering, nor being to be met with, Miles, as well as he was able for intoxication, went his way.

Ridley not coming home that night, and some days passing without his returning, or being heard of, suspicions began to arise, in the mind of Mrs. Ridley, of some foul play against her husband, on the part of Miles; and these were not a little increased, on the recollection that her husband had received a sum of money that day, and that Miles had replied to her inquiries after him, in a very incoherent, unintelligible, broken manner; which, at the time, she had attributed to his being in liquor.

These suspicions went abroad, and at length a full belief took place in many, that Miles was actually the murderer of Ridley; had gone out with him, robbed and murdered him, disposed of the body, and slid back again to the room where they were drinking, unseen by any one.

The officers of justice were sent to take up Miles, and he giving, before the magistrate, a very unsatisfactory relation of his parting with Ridley, which he affirmed was owing to his having been intoxicated when Ridley went out of the room from him, but which the magistrate ascribed to

guiltiness; he was committed to Exeter gaol for trial.

Whilst Miles was in confinement, a thousand reports were spread, tending to warp the minds of the people against him. Supernatural as well as natural reasons were alleged in proof of his guilt. Ridley's house was declared to be haunted! frequent knockings were heard in the dead of the night; two of the lodgers avowed they had seen the ghost! And to crown the whole, an old man, another lodger, positively affirmed, that once, at midnight, his curtains flew open, the ghost of Ridley appeared all bloody! and, with a piteous look and hollow voice, declared that he had been murdered, and that Miles was the murderer.

Under these prepossessions among the weak and superstitious, and a general prejudice even in the stronger minds, was John Miles brought to trial for the wilful murder of William Ridley. *Circumstances* upon *circumstances* were deposed against him; and as it appeared that Miles was with Ridley the whole day, both before and after his receiving the money, and that they spent the afternoon and evening together alone, the jury, who were neighbours of Ridley, found Miles guilty, notwithstanding his protestations, on his defence, of innocence; and he was shortly after executed at Exeter.

It happened, some time after, that Mrs. Ridley left the Red Cow to keep another alehouse, and the person who succeeded her, making several repairs in and about the house, in emptying the necessary, which was at the end of a long dark passage, the body of William Ridley was discovered. In his pockets were found twenty guineas, from whence it was evident he had not been murdered, as the robbing of him was the sole circumstance that could be, and was ascribed to Miles, for murdering of Ridley. The truth of Miles's assertions and defence, now became doubly evident; for it was recollected that the floor of the necessary had been taken up the morning before the death of Ridley, and that, on one side of the seat, a couple of boards had been left up; so that, being much in liquor, he must have fallen into the vault, which was uncommonly deep; but which, unhappily, was not adverted to at the time of his disappearance.

Two men were seen fighting together in a field. One of them was found, soon after, lying dead in that field. Near him lay a pitchfork, which had apparently been the instrument of his death. The pitchfork was known to have belonged to the person who had been seen fighting with the deceased; and he was known to have taken it out with him that morning. Being apprehended and brought to trial, and these circumstances appearing in evidence, and also that there had been for some time an enmity between the parties, there was little doubt of the prisoner's being convicted, although he strongly persisted in his innocence; but, to the great surprise of the court, the jury, instead of bringing in an immediate verdict of guilty, withdrew; and, after staying out a considerable time, returned and informed the court, that eleven out of the twelve, had been from the first for finding the prisoner guilty: but that one man would not concur in the verdict. Upon this, the judge observed to the dissentient person, the great strength of the circumstances, and asked him, "how it was possible, *all circumstances considered*, for him to have any doubts of the guilt of the accused?" But no arguments that could be urged, either by the court or the rest of the jury, could persuade him to find the prisoner guilty; so that the rest of the jury were at last obliged to agree to the verdict of acquittal.

This affair remained for some time mysterious; but it at length came out, either by the private acknowledgment of the obstinate juryman to the judge who tried the cause, (who is said to have had the curiosity to inquire into the motives of his extraordinary pertinacity) or by his confession at the point of death, (for the case is related both ways) that he himself had been the murderer! The accused had, indeed, had a scuffle with the deceased, as sworn on the trial, in which he had dropped his pitchfork, which had been, soon after, found by the juryman, between whom and the deceased, an accidental quarrel had arisen in the same field; the deceased having continued there at work after the departure of the person with whom he had

been seen to have the affray; in the heat of which quarrel, the juryman had unfortunately stabbed him with that very pitch-fork, and had then got away totally unsuspected: but finding, soon after, that the other person had been apprehended on suspicion of being the murderer, and fearing, as the circumstances appeared so strong against him, that he should be convicted, although not guilty, he had contrived to get upon the jury, as the only way of saving the innocent, without endangering himself.

Case of Jonathan Bradford, who was executed at Oxford, England, for the murder of Christopher Hayes, Esq. in the year 1736.

Jonathan Bradford kept an inn, in Oxfordshire, on the London road to Oxford. He bore a very unexceptionable character. Mr. Hayes, a gentleman of fortune, being on his way to Oxford, on a visit to a relation, put up at Bradford's. He there joined company with two gentlemen, with whom he supped, and, in conversation, unguardedly mentioned that he had then about him a sum of money. In due time they retired to their respective chambers; the gentlemen to a two-bedded room, leaving, as is customary with many, a candle burning in the chimney corner. Some hours after they were in bed, one of the gentlemen, being awake, thought he heard a deep groan in an adjoining chamber; and this being repeated, he softly awaked his friend. They listened together, and the groans increasing, as of one dying and in pain, they both instantly arose, and proceeded silently to the door of the next chamber, from whence they had heard the groans, and, the door being a-jar, saw a light in the room. They entered, but it is impossible to paint their consternation, on perceiving a person weltering in his blood in the bed, and a man standing over him, with a dark lanthorn in one hand, and a knife in the other! The man seemed as petrified as themselves, but his terror carried with it all the terror of guilt. The gentlemen soon discovered that the murdered person was the stranger with whom they had that night supped, and that the man who was standing over him was their host. They seized Bradford directly, disarmed him of his knife, and charged him with being the murderer. He assumed, by this time, the air of innocence, positively denied the crime, and asserted, that he came there with the same humane intentions as themselves; for that, hearing a noise, which was succeeded by a groaning, he got out of bed, struck a light, armed himself with a knife for his defence, and was but that minute entered the room before them. These assertions were of little avail; he was kept in close custody till the morning, and then taken before a neighbouring justice of the peace. Bradford still denied the murder, but, nevertheless, with such apparent indications of guilt, that the justice hesitated not to make use of this most extraordinary expression, on writing out his mittimus—"Mr. Bradford, either you or myself committed this murder."

This extraordinary affair was the conversation of the whole country. Bradford was tried and condemned, over and over again, in every company. In the midst of all this predetermination, came on the assizes at Oxford. Bradford was brought to trial; he pleaded—not guilty. Nothing could be stronger than the evidence of the two gentlemen. They testified to the finding Mr. Hayes murdered in his bed; Bradford at the side of the body with a light and a knife; that knife, and the hand which held it, bloody; that, on their entering the room, he betrayed all the signs of a guilty man; and that, but a few moments preceding, they had heard the groans of the deceased.

Bradford's defence on his trial was the same as before the gentlemen: he had heard a noise; he suspected some villany was transacting; he struck a light; he snatched a knife, the only weapon near him, to defend himself; and the terrors he discovered, were merely the terrors of humanity, the natural effects of innocence as well as guilt, on beholding such a horrid scene.

This defence, however, could be considered but as weak, contrasted with the several powerful circumstances against him. Never was circumstantial evidence more strong! There was little need of the prejudice of the county against the mur-

derer to strengthen it; there was little need left of comment from the judge, in summing up of the evidence; no room appeared for extenuation; and the jury brought in the prisoner guilty, even without going out of their box.

Bradford was executed shortly after, still declaring that he was not the murderer, nor privy to the murder of Mr. Hayes; but he died disbelieved by all.

Yet were these assertions not untrue! The murder was actually committed by Mr. Hayes' footman: who, immediately on stabbing his master, rifled his breeches of his money, gold watch, and snuff-box, and escaped back to his own room; which could have been, from the after circumstances, scarcely two seconds before Bradford's entering the unfortunate gentleman's chamber. The world owes this knowledge to a remorse of conscience in the footman, (eighteen months after the execution of Bradford) on a bed of sickness. It was a death-bed repentance, and by that death the law lost its victim.

It is much to be wished that this account could close here, but it cannot! Bradford, though innocent, and not privy to the murder, was nevertheless the murderer in design: he had heard, as well as the footman, what Mr. Hayes declared at supper, as to the having a sum of money about him; and he went to the chamber of the deceased with the same diabolical intentions as the servant. He was struck with amazement! he could not believe his senses! and, in turning back the bedclothes, to assure himself of the fact, he, in his agitation, dropped his knife on the bleeding body, by which both his hands and the knife became bloody. These circumstances Bradford acknowledged to the clergyman who attended him after his sentence.

Case of William Shaw, who was executed at Edinburgh, for the murder of his daughter, in the year 1721.

William Shaw was an upholsterer, at Edinburgh, in the year 1721. He had a daughter, Catharine Shaw, who lived with him. She encouraged the addresses of John Lawson, a jeweller, to whom William Shaw declared the most insuperable objections, alleging him to be a profligate young man, addicted to every kind of dissipation. He was forbidden the house; but the daughter continuing to see him clandestinely, the father, on the discovery, kept her strictly confined.

William Shaw had, for some time, pressed his daughter to receive the addresses of a son of Alexander Robertson, a friend and neighbour; and one evening, being very urgent with her thereon, she peremptorily refused, declaring she preferred death to being young Robertson's wife.

The father grew enraged, and the daughter more positive; so that the most passionate expressions arose on both sides, and the words, "*barbarity, cruelty,* and *death,*" were frequently pronounced by the daughter! At length he left her, locking the door after him.

The greatest part of the buildings at Edinburgh are formed on the plan of the chambers in our inns of court; so that many families inhabit rooms on the same floor, having all one common staircase. William Shaw dwelt in one of these, and a single partition only divided his apartment from that of James Morrison, a watch-case maker. This man had indistinctly overheard the conversation and quarrel between Catharine Shaw and her father, but was particularly struck with the repetition of the above words, she having pronounced them loudly and emphatically! For some little time after the father was gone out, all was silence, but presently Morrison heard several groans from the daughter. Alarmed! he ran to some of his neighbours under the same roof. These, entering Morrison's room, and listening attentively, not only heard the groans, but distinctly heard Catharine Shaw two or three times, faintly exclaim, "Cruel father, thou art the cause of my *death!*" Struck with this, they flew to the door of William Shaw's apartment; they knocked—no answer was given. The knocking was still repeated—still no answer. Suspicions had before arisen against the father; they were now confirmed: a constable was procured, an entrance forced; Catherine was found weltering in her blood, and the fatal knife by her side! She was alive, but speechless; but, on questioning her as to owing her death to

her father, was just able to make a motion with her head, apparently in the affirmative, and expired.

Just at the critical moment, William Shaw returns and enters the room. All eyes are on him! He sees his neighbours and a constable in his apartment, and seems much disordered thereat; but, at the sight of his daughter, he turns pale, trembles, and is ready to sink. The first surprise, and the succeeding horror, leave little doubt of his guilt in the breasts of the beholders; and even that little is done away, on the constable discovering that the shirt of William Shaw is bloody.

He was instantly hurried before a magistrate, and, upon the depositions of all the parties, committed to prison on suspicion. He was shortly after brought to trial, when, in his defence, he acknowledged the having confined his daughter to prevent her intercourse with Lawson; that he had frequently insisted on her marrying of Robertson; and that he had quarrelled with her on the subject, the evening she was found murdered, as the witness Morrison had deposed; but he averred, that he left his daughter unarmed and untouched; and that the blood found upon his shirt was there in consequence of his having bled himself some days before, and the bandage becoming untied. These assertions did not weigh a feather with the jury, when opposed to the strong circumstantial evidence of the daughter's expressions, of "barbarity—cruelty—death," and of "cruel father, thou art the cause of my death"—together with that apparently affirmative motion with her head—and of the blood so seemingly providentially discovered on the father's shirt. On these several concurring circumstances, was William Shaw found guilty, was executed, and was hanged in chains at Leith Walk, in November, 1721.

Was there a person in Edinburgh who believed the father guiltless? No, not one! notwithstanding his latest words at the gallows were, "I am innocent of my daughter's murder."

But in August, 1722, as a man, who had become the possessor of the late William Shaw's apartments, was rummaging, by chance, in the chamber where Catherine Shaw died, he accidentally perceived a paper, fallen into a cavity on one side of the chimney: It was folded as a letter, which opening, it contained the following:

"Barbarous Father,

"Your cruelty in having put it out of my power ever to join my fate to that of the only man I could love, and tyrannically insisting upon my marrying one whom I always hated, has made me form a resolution to put an end to an existence which is become a burden to me. I doubt not I shall find mercy in another world; for sure no benevolent being can require that I should any longer live in torment to myself in this! My death I lay to your charge; when you read this, consider yourself as the inhuman wretch that plunged the murderous knife in the bosom of the unhappy

CATHERINE SHAW."

This letter being shown, the handwriting was recognised and avowed to be Catherine Shaw's, by many of her relations and friends. It became the public talk; and the magistracy of Edinburgh, on a scrutiny, being convinced of its authenticity, they ordered the body of William Shaw to be taken from the gibbet, and given to his family for interment; and, as the only reparation to his memory and the honour of his surviving relations, they caused a pair of colours to be waved over his grave, in token of his innocence.

An ALPHABETICAL DIGEST *of the Principal Matters, decided by the* SUPREME COURT *of the state of* NEW-YORK, *with references to the cases reported at large, in the* 16*th and* 17*th volumes of* JOHNSON'S REPORTS.

ACCORD AND SATISFACTION.

1. A creditor agreed to accept turnpike stock for his demand; the certificates were to be left with G. B. where he was to call for them: they were left. *Held*, that G. B. was the depository of the certificates, and that his receipt of them was the receipt of the creditor. 16 *Johns. Rep.* 86.

2. By mistake, the certificates were made out to *John* instead of *James*: This made no difference. *Ib.* 88.

3. An accord, not executed, is no bar to the pre-existing demand. *Ib.*

4. But if executed by delivering a col-

lateral thing, which is agreed to be accepted as satisfaction. it is a bar. *Ib.*

Vide 5 *Johns. Rep.* 386. 3 *Johns. Cas.* 243. 2 *Johns. Rep.* 345, 450. 3 *Term Rep.* 24. 4 *Term Rep.* 589. 1 *Boss. & Pull.* 90. 173. 2 *Tidd's Pr.* 811.

ACTION.

1. A parol agreement for the sale of land is void by the statute of frauds. Such an agreement being made, the owner of the land brought and tendered the deed on the day appointed, but it was not accepted; and then he brought a suit to recover what he had paid for drawing the deed, and recovered five dollars; this recovery was reversed on *certiorari*, for it is one entire contract, and void in all its parts for every purpose. 16 *Johns. Rep.* 151.

2. Gerry was indebted to both plaintiff and defendant, and gave them a carriage to sell, with the proceeds of which their debts were to be paid. The defendant had been in possession of the carriage upwards of a year; had used it several times, and had had it repaired, the plaintiff refusing to join in the expense, or to use the carriage in common. And it was held, that the defendant ought to be considered as the *purchaser*, and therefore liable to pay the plaintiff what was due to him. *Ib.* 225.

3. An action does not lie to recover from a child, for the maintenance of his aged and destitute parent. 16 *Johns. Rep.* 281.

ACTION ON THE CASE.

Vide TROVER, 1.

AFFIDAVIT.

1. The Supreme Court refused to receive the affidavits of persons interested in property taken or assessed by the corporation of New-York, for an intended improvement of Harman-street; because they ought first to have been laid before the commissioners of estimate and assessment, for they are bound, in case objections are made to their report, to review it. They ought, therefore, to have the affidavits, that they may judge whether there is any reason for altering or amending their report. This court, sitting in review over the decisions of these commissioners, ought not to take into consideration facts which were not before the commissioners, before they made their final report. 16 *Johns. Rep.* 231.

2. The act of 24th March, 1818, authorizing the appointment of commissioners to take affidavits, did not supersede the commissioners appointed by the Supreme Court. *Ib.* 232.

AGRICULTURAL SOCIETIES.

1. The reasonable construction of the *act for the promotion of agriculture and family domestic manufactures*, though no precise directions are given for the purpose, is, that these societies should be formed after due public notice, to all the inhabitants of a county. 17 *Johns. Rep.* 87.

2. The provision in the act authorizing two contiguous counties to form one society, was intended for small counties. *Ib.* 89.

AMENDMENT.

A plaintiff may, in his declaration, state his damages to any amount he pleases; and he is the best judge of them; but if he obtains a verdict beyond the amount laid, the court have no power to allow him, by amending his declaration, to increase the sum to the amount of the verdict. 17 *Johns. Rep.* 111.

ARREST.

Though the front door be fastened, if the back door be open, the sheriff has a right to enter and break open, any inner door, to serve a writ. 17 *Johns. Rep.* 127. *See Cowp. Rep.* 1.

ARSON.

Fire and combustibles had been placed on the stairs of an "*inhabited dwelling house;*" and two or three of the stairs were partly burnt; but the fire was then extinguished: *held*, that this is a burning of "an inhabited dwelling house" within the act, as completely as if the whole house had been consumed. 16 *Johns. Rep.* 203.

ASSETS.

Vide EXECUTORS, 3, 4, 5.

ASSIGNEE.

1. Courts of law will notice and pro-

tect the rights of assignees, of a *chose in action*. 16 *Johns. Rep.* 54.

2. And though a judgment be obtained against the debtor, after assignment and notice, it will be no bar to an action brought for the benefit of the assignee. *Ib.*

3. The assignee of a mortgage may be let in, in an action of ejectment, as defendant, in the place of the tenant. 17 *Johns. Rep.* 112.

4. A note, not negotiable, was assigned to *Hoskins*, who showed it to the maker, and the maker promised to pay it to him. A suit was brought by Hoskins in the name of the payee, and the maker set off a note made by the payee to a third person, three years before the note in question, and endorsed to him, and also a memorandum dated a year and a half before, signed by the payee, acknowledging himself indebted to the maker. The court held, that in the absence of all explanation, the note, on which the suit was brought, was *prima facie* evidence that all previous demands were satisfied; and that as a promise to pay had been made to Hoskins, after the assignment, the presumption that the demands offered as a set-off, had been previously settled, was not to be resisted. *Ib.* 226.

ASSUMPSIT.

1. The defendant, in a memorandum signed by him, stated an account, and therein promised to pay the plaintiff the amount of it, and added, "the above to be paid out of my one half proceeds of provisions and lumber, addressed to Messrs. H. & M. after deducting your account." This was held not to be a promissory note, being payable out of a particular fund. 17 *Johns. Rep.* 39.

2. But it is good evidence in support of a count on an *insimul comput assent*. *Ib.* 40.

3. But before recourse can be had to the signer of this memorandum personally, it must be shown, either that there was no such fund, or that it was insufficient to pay the debt, or that application had been made to the holders of the fund, without satisfaction being obtained. *Ib.*

4. *Assumpsit* does not lie on a judgment obtained before a justice. It is at least equivalent to a specialty, and the action should be debt. 17 *Johns. Rep.*

ATTORNEY AND COUNSELLOR.

See PRACTICE, 10.

1. An attorney was proceeded against by *capias*, and the declaration, &c. put up in the office. This is irregular: he should be served with all papers, as in other cases. 17 *Johns. Rep.* 1.

2. The court received an affidavit taken by a commissioner, who was an attorney, and in partnership with the attorney on the record: but as his name did not appear on the record as one of the attorneys in the cause, it was deemed not to be within the case of *Taylor* vs. *Hatch*, 12 *Johns. Rep.* 34. *Ib.* 2.

3. At the trial of an ejectment, the plaintiff's counsel was called on to produce a will, which he refused to do. He was then called as a witness, to prove the will to be in his posseesion in court, a written notice having been just before handed him to produce it; and it was held, that he was bound to say whether he had it or not; though he objected, because what he knew had been entrusted to him in his professional capacity. 17 *Johns. Rep.* 335.

4. The general rule is, that the attorney is not to be compelled to disclose confidential communications between him and his client, made in the course of his professional business. But as to *collateral* matters, the knowledge of which he has acquired by personal observation, and which were not communicated as a secret, or as to such *collateral* facts, which may be material for the other party, and the answer to which does not betray any confidential communication between him and his client, the attorney may be compelled to answer. *Ib.* 338.

AUCTIONEER.

1. An auctioneer may maintain *assumpsit* in his own name, for goods sold by him at auction, inasmuch as he has the *possession* of the goods, and a *lien* on them. And it makes no difference if the sale is at the owner's house, and the goods known to be his. *Vide Williams* vs. *Millington*, 1 *H. Black. Rep.* 81. 16 *Johns. Rep.* 2.

2. An auctioneer gives credit at his own risk. *Ib.*